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A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba

PER GISVOLD

ECONOMICS DIVISION

Canada Department of Agriculture

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Prairie Farm Rehabilitation Administration
and
Economics Division,
Canada Department of Agriculture

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Preface

This study, "A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba", was made by the Prairie Farm Rehabilitation Administration and the Economics Division of the Canada Department of Agriculture. It is one of a series of studies being undertaken by these co-operating agencies to co-ordinate all facts known concerning the geographical location of interprovincial watersheds in relation to present and probable future activity and needs, and to evaluate the legal and economic significance of various physical and engineering possibilities related thereto.

The decisions by the Supreme Court of Canada, the Privy Council and the House of Lords during the last hundred years, together with the decisions by the provincial courts of Alberta, Saskatchewan and Manitoba during the last fifty years and the relevant federal and provincial statutes, have been used as basis for the study. It has not been possible to include a study of orders in council, rules and regulations made under statutory authority.

The mass of material made a further limitation necessary and it was decided to leave out the law governing utilization of water for communication purposes which, relatively speaking, is of minor importance compared with other uses within the area of the Saskatchewan River Basin.

Within these limits an attempt has been made to coordinate case law and statute law so as to present a survey of the main body of law presently in force. The summaries are intended only for source references and guidance.

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CHAPTER I

Introduction.[1]

I. The Water in the Saskatchewan River Basin and Its Uses

The Saskatchewan River Basin rises in the eastern slope of the Rocky Mountains, flows through Alberta, Saskatchewan and part of Manitoba where it empties into Lake Winnipeg. The drainage area of the basin is about 149,500 square miles.[2] An estimated population of a little over one million is, apart from percolating water, dependent upon the Basin for various water uses. The aridity of the climate[3] gives an enhanced importance to the water in the rivers and lakes of the Basin by making the possibility of obtaining water supply from this source a necessary condition for many kinds of economic activity. The physical shape of the landscape, its back of elevation creates particular problems for drainage of land and protection of the land against flood.

The water is used for a variety of different purposes, the main being consumption for domestic, municipal, industrial or irrigation purposes; non-consumptive use for creation of water power and hydro-electric power; uses which may affect the quality of the water where drainage, sewers or pollutive materials are emptied into waters of the Basin; use of water for purposes of communication: for floating, navigation, canals, ferries and bridges; use of the water for fishery and cutting of ice.

Any of the above uses which a person makes of water may reduce the possibility of his neighbors being able to use it for a similar or different purpose: water used by a farmer in watering his stock may, on a small creek, impede the farming operations of his downstream neighbor. A dam thrown across a river may back water on to the land of the upstream neighbor, and may if it breaks, cause damage to the downstream neighbors. Development of hydro-electric power necessitates storage of the high flow of water during summer

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[1] The decisions by the Supreme Court of Canada, the Privy Council and the House of Lords during the last eighty years together with the decisions by the provincial courts of Alberta, Saskatchewan and Manitoba during the last fifty years and the relevant federal and provincial statutes have been used as basis for the study. It has not been possible to include a study of orders in council, rules and regulations made under statutory authority.

The subject matter referred is "the law pertaining to water in Alberta, Saskatchewan and Manitoba". These terms of reference exclude water law dealing solely with tidal waters and the high seas. The mass of material made a further limitation necessary and it was decided to leave out the law governing utilization of water for communication purposes which, relatively speaking, is of minor importance compared with other uses within the area on the Saskatchewan River Basin. Within these limits an attempt has been made to coordinate case law and statute law so as to present a survey of the main body of law presently in force.

[2] This is the estimate of the Basin above The Pas, Manitoba. See Surface Water Supply of Canada, Arctic and Western Hudson Bay Drainage, and Mississippi Drainage in Canada, *Water Resources Paper No. 109*, Ottawa, Department of Northern Affairs and National Resources, 1954, p. 173.

[3] Rainfall varies, the precipitation in the southwest, on the average being about 13 inches, while in the northeast it averages about 18 inches. Source: Climatic Summaries for Selected Meteorological Stations in the Dominion of Canada, Vol. 1, n.d.

time in reservoirs for release during the low flow in the winter time.[4] Irrigation projects are, on the other hand, best served by a high flow of water during the summer time and cannot facilitate the winter flow unless reservoirs are built. Sewage or other pollutive waters emptied into a river may make the water downstream unfit for use as drinking water. A bridge across a river may impede navigation. Floating ice may damage bridges, and so on.

Simplicity in the law is desirable where it can be achieved without loss of substantial justice. This is in the main possible only where the human relations subject to the law in question devolve or can be made to devolve in a simple pattern. The variety of uses to which water is put, the water users' dependence upon each other, and the scarcity of water on the Prairie Provinces, create a multitude of conflicting situations where the desired uses cannot all be satisfied. The complexity of these conflicts accounts for the complexity of the law by which they are governed.

II. Fundamental Principles of the Law Governing the Use of Water

The law imposes many limitations on a person's right to use real property where harm or damage to the use of neighboring property would otherwise result. But as it is only in the exceptional case that the use of land may have such effects, these rules appear there as exceptions to the general rule that a man may do as he pleases with his own property.[5]

Use of water is, on the other hand, almost always capable of inflicting harm or damage to the property of the neighbor or of reducing his possibilities to make use of the water. The legal considerations which are found in the circumference of the land law are therefore in the center of the water law. There is this additional difference that whereas neighbors on land usually are confined to the borders of the property, the neighbors on the water may extend as far as the watercourse itself. It may be said that the broad object of the rules of common law pertaining to water is maintenance of good neighbor relations.[6] This implies, on the one hand, that a person in using water, must take care not to interfere with his neighbor's use of water and land, on the other hand that the neighbor must show caution in trying to prevent the development of water uses where these appear as natural and reasonable under the circumstances.[7]

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[4] Something of the regimen can be seen from examining the extremes of stage recorded at The Pas, Manitoba. Maximum, June 11, 1948, 105,500 c.f.s.; minimum, February 3-4, 1930, 1,790 c.f.s. See: *Water Resources Paper No. 109*, p. 173.

[5] *Bonomi v. Backhouse*, E.B. & E. 654 at 659: "We think that the right which a man has is to enjoy his own land in the state and condition in which nature has placed it and also to use it in such a manner as he thinks fit, subject always to this: that if his mode of using it does damage to his neighbor he must make compensation."

[6] *Bonomi v. Backhouse*, supra at 655: "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being prima facie a right of property analogous to the flow of a natural river." *Rylands v. Fletcher* (1868), L.R. 3H.L. 330 at p. 340: "The person whose grass or corn is eaten down by the escaping cattle of his *neighbour*, or whose mine is flooded by the water from his *neighbour's* reservoir or whose cellar is invaded by the filth from his *neighbour's* privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his *neighbour's* alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the *neighbour* who has brought something on his own property (which was not naturally there) harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his *neighbour's*, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

[7] *Embrey v. Owen*, 6 Ex. 353, Baron Parke: "It is only of an unreasonable and unauthorized use of this common benefit that an action will lie."

The rules of common law have, in the main, been replaced by statutory provisions requiring allocation of water by administrative decision, where the object is to secure the most beneficial use of water. This implies that these allocations are to be made so as to achieve the highest amount of total economic benefits which can be made out of the possible uses to which a given source of water may be put within each province. The same principle underlies the rules with regard to expropriation. Since most water uses today are dependent upon allocation by administrative decision or expropriation, it follows that the leading principle of the law pertaining to water is the principle of most benefical use.[8]

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[8] The principle of first in time first in law, as expressed in the American doctrine of prior appropriation, has never been adopted into the law of Alberta, Saskatchewan and Manitoba.

CHAPTER 2

Acquisition of Water Rights by Agreement

I. Various Modes of Acquisition

Water rights may be acquired by agreement, by succession to property upon death testate or intestate, by execution, by legislation either immediately or when certain conditions occur, by decision of a court, by administrative decision, by expropriation, and by use.

The rights acquired by the various water users' organizations upon their formation may be said to represent acquisition by a combination of some of the above-mentioned modes, since agreement as well as some kind of administrative decision ordinarily are required.

With regard to acquisition by agreement a brief survey will be made of the major general rules of construction, in addition to special rules concerning water rights. Acquisition by administrative decision, expropriation and use will be dealt with to the extent that they represent rules peculiar to water rights. For other modes of acquisition a special treatment of water rights does not seem warranted.

II. Interpretation

(i) No question of interpretation will arise where the words used in the agreement are capable of one meaning only. The relationship between the parties will then be governed by the plain meaning of the words: North Eastern Ry. Co. v. Hastings.[1] Nor will any question of interpretation arise where the words, although capable of different meaning are incapable of baring the meaning contented for by one of the parties to a dispute: Trustees of Clyde Navigation v. Laird.[2]

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[1] (1900) A.C. 260. The Appellant Ry. Co. had entered into an agreement for lease of way-leave over lands belonging to the respondent's predecessor in title, against certain royalties to be paid on goods conveyed "over *any part of the railways* comprehended in the Blyth and Tyre Railway Consolidation and Extension Act 1854." Part of the railways did not pass over the lands in question. The respondent brought an action claiming that he was entitled to royalties whether the goods did or did not pass over the lands. For more than forty years the royalties had been paid only in respect of such goods as had been conveyed over the lands. The appellant's allegation that the agreement should be interpreted in light of this use was rejected. See the judgment of Lord MacNaghten at p. 267: "There is not in my opinion any ambiguity of any sort in the clause which has given rise to so much discussion at the bar, and therefore I think the agreement must have effect according to the plain meaning of the language the parties have deliberately chosen to employ." See also the judgment of Earl of Halsbury L.C. at p. 263 and 264.

Wyatt v. Attorney-General of Quebec (1911) A.C. 489. Lands had been granted along the banks of the river Moisie the object of which was to secure the right of fishing in the river. Such right had been exercised by the grantee without hindrance or interference and it was considered by the officials of the government of Quebec, the grantor, that the right of fishing had passed. Nothing was said in the grant about fishing rights. It was at the time of the making of the grant uncertain whether the title to the fishery was vested in the Dominion or the Province. The appellant's consideration was trifling as compared with the value of the fishing rights. It was held that the plain and unambiguous language of the grant governed the rights of the parties and that the fishing rights consequently had not passed.

[2] (1883) 8 App. Cas 658, See Lord Blackburn's votum at p. 668: "But though I think the reasonableness of a scheme is a very good reason for thinking that the legislature might have wished to adopt it, and therefore for construing the words used as shewing an intention to carry it out, if the words used will bear such a sense, it affords no justification for introducing new words, or construing the words used in a sense which they cannot bear..." A statute gave the trustees of Clyde Navigation power to charge dues on all timber "shipped or unshipped" within the river and harbour. These words were held incapable of covering timber rafts and logs towed down the river by ships.

(ii) A disputed agreement must in all other cases be interpreted. When it has been ascertained that the agreement is capable of bearing the meaning alleged by either party, one of two or more possible meanings must be chosen as the one governing the dispute. To decide these questions it is necessary not only to test the alleged meanings against the words, but also to take into consideration all the circumstances of the making of the agreement, in particular time, place and use.

The meaning of words may change with the times. It is the meaning the words were capable of bearing at the time of the making of the agreement which must be ascertained, not the meaning at the time of the dispute. Where the same words are repeated unaltered from time to time, as in renewable leases, they will be taken to have been used in their former meaning and it becomes necessary to go back to the time of the original agreement.

The place is important in a double sense. First, it is the meaning at the place where the words were used which is to be ascertained. Language usage may differ from place to place. A term used in an agreement in Manitoba may, for instance, be capable of bearing a meaning different from what it will bear when used in Saskatchewan if different language usages are in existence. Secondly, the place is important in this sense, that the shape of the landscape and other circumstances of the place to which the agreement refers may illuminate the question.

Where the right has been exercised in a certain way, this use will indicate that the grantee has taken the words to be capable of bearing a meaning which will permit the use. And if the use has been undisturbed the same meaning must have been attributed to the words by the grantor, which in its turn will indicate that the words were capable of bearing this meaning at the time and place of the execution of the agreement. In this case the meaning permitting the use must also be chosen as the one governing the dispute, since the grantor not having objected to the use must have had this intention when he made his grant: Waterpark v. Fennell.[3]

The use which has been made of a right granted under an agreement is a circumstance to be taken into account in the interpretation as well of a recent as of an "ancient" agreement. Use preceding the agreement is important where the object of the agreement is to confer a right corresponding with the use: Van Diemens Land Co. v. Table Cape Marine Board.[4]

No fixed rules exist with regard to the period of time over which the use must have taken place in order to govern the dispute where the use comes in only as an element in the construction of an agreement. It may be said in general

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Hart v. Maine & N.B. Elec. Power Co. (1929) 2 W.W.R. 661. A power co. which had purchased certain water rights covenanted to pay $8 for each excessive horse power "if water power to a greater extent than two thousand horse power be *at any time* developed." Excessive horse power was to be divided into units of 500 and "each unit to be *immediately* paid for in entirety when any part thereof has been developed and used." The plaintiff alleged that the amounts were chargeable from time to time upon the maximum peak load once reached. The power co. contended that the average power produced over a reasonable period of time should be taken as basis. This contention was held irreconcilable with the words used.

[3] 7H.L.C. 650. The word "village" used in an Irish lease originally granted in 1704 was held wide enough to effect the passing of 1,700 acres of adjoining mountain land where the land had been subject to the lessee's use undisputed by the lessor for a considerable period of time. See, for instance, from the judgment of Lord Cranworth at 680: "It is certain that where parcels are described in old documents by words of a general nature, or of doubtful import, we may, indeed we must, recur to usage to show what they comprehend."

[4] (1906) App. Cas. 92. The issue was whether a crown grant of land bordering on a bay was to be construed to extend to high water or to low water mark on the bay. The appellant had offered in evidence acts of user prior to the grant which recited that the appellant had taken possession of the lands intended to be granted. The trial judge had directed the jury that this was not evidence at all since the acts were antecedent in date to the grant by the crown. The decision was reversed by the Privy Council ordering a new trial.

that where the alleged meanings of the agreement are equally possible even a use exercised only for a short time may be decisive, whereas more will be required where the other circumstances of the case point to another solution.

Other circumstances, whether before or after the execution of the agreement, which can establish its purpose must be taken into account.

The question whether a term used in an agreement is to be construed objectively or subjectively must vary with the circumstances. Precise and detailed wording of an agreement will tend towards objective construction, whereas vague and ambiguous wording will allow for subjective construction. Where the other circumstances keep each other in balance the objective or usual meaning must be chosen: M'Nab v. Robertson.[5]

(iii) Where a right granted or a reservation made in a grant cannot by possibility be exercised unless another right, not mentioned, is also in existence, the grant or reservation may be held to include this other right although it is not mentioned. Thus in the case of Remfrey v. Surveyor General of Natal, (1896) A.C. 558, the respondent sold land to the appellant reserving, i.a., the right without compensation to have watercourses made over any part of the land, for the public use and benefit, by order of the colonial government. No right to divert water from the streams running through the land had been expressly reserved but was held to be included in the reservation. Lord Davey, in delivering judgment on behalf of the Privy Council said, at p. 560: "Looking at the terms of the reservation, and the purposes for which it was made, and the lack of any suggestion that water would be required to be conveyed from any other source, their Lordships think that the right to make the watercourse in the present case included the right to divert the water from the streams in the appellant's land into it, and to use the water so diverted." It will be seen that this type of situation is different from the one dealt with under (i) above in the following respect: There the question was whether new words could be introduced into an agreement where the words used would be capable of regulating the relationship between the parties, which is answered in the negative. Here the question is whether an assumption which of necessity must have been underlying the agreement, although not expressed, shall regulate the relationship where the grant or reservation would otherwise be incapable of reaching the object for which it was made, which is answered in the affirmative.

The right of a person to the ownership of the bed of rivers and lakes upon acquiring land adjoining the water was previously said to be implied in the grant of the land. Legislation has brought about considerable changes in this position. These questions will be dealt with under Chapter 9.

(iv) It should also be noted that where a deed as executed is not in accordance with the intention of the parties, the courts may rectify the deed so as to make it conform to the common intention of the parties executing it.

III. Restrictions on Alienation of Water Rights

(i) A person who has acquired a water right may as a general rule by way of agreement transfer the right to some other person, unless alienation is expressly prohibited in, or results from the construction of, the document in which the water right originates. Alienation of water rights are also sometimes prohibited or restricted by law.

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[5] (1897) A.C. 129, where it was held by the majority of the House of Lords that the word "streams" used in a lease did not include water percolating through marshy ground into a pond, the word being taken in its primary and natural sense. See Lord Watson's definition of "stream" at p. 134. See, on the other hand, the dissenting judgment of Halsbury L.C. at p. 143, holding upon the basis of the natural shape of the land and the purpose for which the lease was made that every source of water supply had been conveyed, including this percolating water, by means of the term "streams".

(ii) Due to its public importance rules have been introduced limiting the alienability of water power on public lands and the lands themselves. The significance of these rules will be seen when compared with the rules governing ownership to the beds of rivers and lakes. Lands covered with water are in the main public lands.

The general condition for the restrictions is that the lands in question are Dominion or Provincial lands. This concept is differently defined in each of the four jurisdictions. Canada defines it as lands belonging to Her Majesty in right of Canada including lands of which the government has power to dispose. Alberta defines it as lands or any interest therein vested in the Crown and any other lands or interest therein under the control and management of the Department of Lands and Forests, the Department of Mines and Minerals or the Department of Municipal Affairs. Manitoba defines it as lands or any interest therein vested in the Crown and lands or any interest therein under the control and management of the Minister of Mines and Natural Resources. In Saskatchewan "Provincial lands" means lands vested in the Crown. But such lands as under an Act of the Legislature are administered by any department of the government other than the Department of Agriculture or the Department of Natural Resources are excepted.[1]

In addition either one of the following three conditions must be present: (a) There must be water power upon or within the lands. By water power is meant any form of energy contained in or capable of being produced from flowing or falling water in such quantity as to make it of commercial value. (b) The lands must be required for the protection of any water power, or (c) Required for the purposes of any undertaking.[2]

It will be seen that whether water power is of commercial value may vary with the times. Increased population or new technical inventions may render commercial value to previously valueless water power. Whether lands are required for the protection of any water power or for the purposes of any undertaking may likewise vary from time to time. The question may then arise if the circumstances as they existed at the time of the making of the disposition or at the time the disposition is questioned are to be decisive. The latter solution would introduce a high degree of uncertainty into all dealings in land with the Crown, which is against the public interest, intended to be furthered by the provisions. It would also make the rules incapable of practical application by the public authorities charged with their administration. For these reasons the circumstances at the time of the making of the disposition must be decisive. Reasonable expectations of future developments will form part of these circumstances.

Where the general condition and one of the alternative conditions are present the land and the water powers and water thereon are inalienable, i.e., not open to sale. This is expressly provided for by each of the three provinces.[3]

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[1] Canada: R.S.C. 1952, c. 90, s. 5(1) and 2(c).
Alberta: R.S.A. 1955, c. 362, s. 69, 2(p).
Manitoba: R.S.M. 1954, c. 288, s. 7(1) and 2(e) and (f).
Saskatchewan: R.S.S. 1953, c. 49, s. 6 and 2.3, cpr. R.S.S., 1953, c. 45, s. 2.9.

[2] Canada: R. S. C. 1952, c. 90, s. 5(1) and 2(f) and (e).
Alberta: R.S.A. 1955, c. s. 69, 2(t), (v).
Saskatchewan: R.S.S. 1953, c. 49, s. 6 and 2.8 & 2.7.
Manitoba: R.S.M. 1954, c. 288, s. 7(1) and 2(j) and (i). The definition of 'undertaking' is similar in Canada, Saskatchewan and Manitoba. A slightly different definition was introduced in Alberta by the 1943 amendment.

[3] Alberta: R.S.A. 1955, c. 362, s. 69.
Saskatchewan: R.S.S. 1953, c. 49, s. 6.
Manitoba: R.S.M. 1954, c. 288, s. 7.
Saskatchewan and Manitoba use the term "shall not be open to sale" whereas Alberta uses the term "shall not be alienated." But the terms are probably interchangeable.

Canada has no corresponding express provision, but the rule is the same as the Dominion Water Power Act, S. 5(1), stipulates that no interest shall be granted or conveyed by the Crown except where provided for by the Act, and the Act has no provision permitting sale.[4]

Grants which do not involve sale—concessions—may be made provided they are in accordance with the provisions of the respective statutes of the four jurisdictions. These statutes authorize, as a general rule, the governments to provide regulations for the granting of concessions.[5] Saskatchewan and Manitoba have the additional provision that no concession shall be granted if the water power is capable of developing more than 12,500 or 25,000 continuous horse power, respectively, unless prior approval or subsequent ratification has been given by the legislature.[6]

Where a sale or a concession has been granted in violation of these rules the question arises whether the grant is voidable or void. The wording of the statutes points to the latter solution. The Domnion Water Power Act, s. 5(1), provides that "any grant or conveyance hereafter made of any such lands or any interest therein, except in pursuance of this Act and the regulations, shall not vest in the grantee any exclusive or other property or interest with respect to such lands." Similar words are used in the provincial statutes.[7] One of the main objects of the water power legislation appears to be to vest the water power in the Crown and to keep it vested there, due to its public importance. This object cannot by fully achieved unless sales violating the rule against alienation are treated as being void. Since the statutes do not differentiate between the effect of sales and other grants concessions made in violation of the rules must also be void. Concessions given in Saskatchewan and Manitoba without prior approval by the legislature where the water power in question is capable of developing more than 12,500 and 25,000 continuous horse power, respectively, will be void where ratification is refused.

Canada, Saskatchewan and Manitoba have an exception to the rule against alienation "where small areas only of any parcel or subdivision of any public lands are required to be submerged along the bank of any stream in connection with an undertaking, and where it has not been found practicable or expedient to make surveys for the purpose of setting out the exact limits of the area to be flooded." Such land is not inalienable according to the above-mentioned rules, but may be sold with the part of the land not required to be submerged.[8]

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[4] The Dominion Water Power Act, s. 12(b) authorizes the Governor in Council to make regulations "for the development, transmission, distribution, *sale*, exchange, disposal or use of water-power on, through or over public lands or any other lands." But it follows from the context that the sale of water power here contemplated is sale to the consumer by a water power company operating under concession from the Crown, and not sale by the Crown of flowing or falling water. The corresponding provisions in the provincial statutes must be given the same interpretation. See R.S.A. 1955, c. 362, s. 78(1)(b)(XVI); R.S.S. 1953, c. 49, s. 16(1) (b); R.S.M. 1954, c. 229, s. 14(1) (b) (ii).

[5] Canada: R.S.C. 1952, c. 90, s. 12(f).
Alberta: R. S. A. 1955, c. 362, s. 78(1)(b)(XX).
Saskatchewan: R.S.S. 1953, c. 49, s. 16(1) (f).
Manitoba: R.S.M. 1954, c. 288, s. 14(1) (b) (vi).

[6] Saskatchewan: R.S.S. 1953, c. 49, s. 7(b).
Manitoba: R.S.M. 1954, c. 288, s. 7(2).

[7] Alberta: R.S.A. 1955, c. 362, s. 69.
Saskatchewan: R.S.S. 1953, c. 49, s. 6.
Manitoba: R.S.M. 1954, c. 288, s. 7(1).

[8] The right to raise the water surface to the elevation as may be required in connection with the undertaking is reserved.
Canada: R.S.C. 1952, c. 90, s. 5(2).
Saskatchewan: R.S.S. 1953, c. 49, s. 10.
Manitoba: R.S.M. 1954, c. 288, s. 7(5).

Where part of an agreement violates the rules against alienation or the rules and regulations for concessions and another part does not, the latter part may be valid provided the agreement is severable.

(iii) The public importance of certain lands have led to the introduction of statutes prohibiting or restricting alienation of the lands as well as the water on the lands. This is particularly the case with National and Provincial Parks, Forests and Forest reserves.[9] The beds of the waters within the provinces are likewise inalienable.[10]

(iv) A water right may be inalienable due to the type of tenancy held. Rights held in fee or leases are never inalienable solely by reason of the type of tenancy involved. Permits are personal and cannot be alienated. An example is fishing permits. A license is alienable if it is coupled with a grant of an interest in property, not otherwise.[11]

Important exceptions are contained in the rules governing rights acquired by administrative decisions. Such rights may be granted by permit, interim or final license. Alberta has expressly provided that these licenses are appurtenant to the land or undertaking for which the right was granted. The right is not severable from the land or undertaking in question and will pass with the same. This can be dispensed with only by order in council.[12] Saskatchewan and Manitoba have no similar express provisions but it is possible that the same result will follow from an interpretation of the respective statutes and their purpose, unless the individual grant sets out a different solution. The Water Rights Act, R.S.M. 1954, c. 289, s. 35 stipulates that where land to be irrigated has been held under a conditional entry which is cancelled, the water license shall also be cancelled and may be reserved and disposed of together with the land and the work to the next occupier. A new license issued is to have the same priority as the original cancelled license. This is a strong indication that water rights granted for irrigation purposes are meant to be appurtenant to the land. Similar provisions are contained in the Saskatchewan Act: R.S.S. 1953, c. 48, s. 50. The considerations underlying the rules which treat water licenses for irrigation purposes as appurtenant to land are equally present when water is granted for industrial purposes or any other purpose authorized by the respective acts.

The exceptions here mentioned apply to those administrative grants as fall within the statutes in question.[13]

(v) Rights in the nature of easements can ordinarily not be acquired unless there is both a dominant and a servient tenement, i.e., one estate which will be directly favored and another which will be directly burdened by the right in question. There must also be a certain physical proximity between the two tenements. When created the easement cannot be alienated otherwise than in connection with and as appurtenant to the dominant tenement. From these rules there are some exceptions of importance for water rights.

(a) *Alberta.*—S. 71 of the Land Titles Act, R.S.A. 1955, c. 170, makes it possible to make grants in the nature of easements of rights to carry pipes,

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[9] See f.i., the National Parks Act, R.S.C. 1952, c. 189, s. 6; The Provincial Parks Act, R.S.A. 1955, c. 249, s. 10; Provincial Parks and Protected Areas Act, R.S.S. 1953, c. 50, s. 10.

[10] Cpr. Chapter 9.

[11] Muskett v. Hill (1839), 5 Bing (N.S.) 694.

[12] The Water Resources Act, R.S.A. 1955, c. 362, s. 21.

[13] Two cases from B.C. treat water licenses or records as appurtenant to land: Vaughan v. Eastern Townships Bank (1909), 10 W.L.R. 165, and Dalton v. West Shore & Northern Land Co. Ltd., (1920), 2 W.W.R. 1022. In a third case, also from B.C., the pltf. was the holder of a mining lease which was renewed from time to time. In addition he held a water license or record expressly limited to five years. A renewal of the mining lease after the expiry of this time limit was held not to effect an automatic renewal of the water license: Lighting Creek Mining Co. v. Hopp (1914), 28 W.L.R. 110.

wires, conductors and transmission lines upon a servient tenement. The grant must be made in favor of the Crown, a pipe line, public utility or railway company. Public utility includes "any system, works, plant, equipment or service for the production, transmission, delivery or furnishing of water, heat, light or power, either directly or indirectly to or for the public".[14]

Since the right must be registered in the land titles office to be legally protected as an easement it follows that it must be in writing and signed by the registered owner of the land to be burdened by the disposition.

(b) *Saskatchewan.*—The right must be for carrying wires, cables, conducting electric power transmission or distribution lines, construction of drainage ditches, sewage disposal plant, drain pipes, sewer pipes, water pipes or other conducts upon the servient tenement, as well as the right of access to and egress from the work in question.

The grant must be made in favor of the same persons as in Alberta.

It must be made by the registered owner of the land to be burdened and in written form in order to be registered. See the Public Utilities Easements Act, R.S.S. 1953, c. 117, s. 2.

(c) *Manitoba.*—The right must be of the following nature: for the conveyance of water; drainage; disposal of sewage; carrying or laying pipes or wires; carrying, laying, erecting or building conduits, cables, wires, poles or transmission lines; erection or maintenance of a public work.

It must be made in favor either of the Crown; certain specified public boards; a municipal organization; an industrial townsite; the owner of a public utility; a person supplying water, power, light, fire protection, drainage, sewage, (telephone or telegraph) services; or a pipe-line company.

The right must be granted in writing and by the owner or a person entitled to be registered as owner. It must be signed by both vendor and purchaser if the land has been sold under an agreement for sale. See the Real Property Act, R.S.M. 1954, c. 220, s. 111.

(d) A right which satisfies the above provisions in either one of the three provinces will be treated as an easement whether or not there is a dominant tenement, or if there be one without regard to the qualifications generally required of a dominant tenement.

The right will, if duly registered, be binding as well upon the grantor as upon any person acquiring title to the servient tenement through him.

Assignment of the right is permitted by the Alberta and Manitoba statutes but without mentioning whether the right must be assigned as appurtenant to the works or the part of the works in favor of which it was granted. But it is probable that the provisions must be given this interpretation. A complete severance of the right from the works might impose a burden on the servient tenement substantially different from what was contemplated between the parties.

The Saskatchewan statute expressly terms the right an easement, and stipulates that it enures to the benefit of the grantee and his assigns for the purposes of which it was granted. The effect must be that the right can only be assigned in connection with the works or such parts thereof as it was intended that the right should serve, as a severance would make the right serve a purpose different from the purpose for which it was granted.

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[14] The Public Utilities Act, R.S.A. 1955, c. 267, s. 2(m) (iii).

(e) A convenient procedure for securing protection of easements in connection with waterworks under the system of land registration in Saskatchewan has been established by the Water Rights Act, R.S.S. 1953, c. 48, s. 38. Where it appears from a licensee's application or the plans filed that the works will affect any land other than that on which the works are constructed and the owner of the land to be affected has consented to the construction of the works, the chief engineer shall after the issue of the license issue a certificate which is registered by the proper registrar of land titles. This certificate is signed by the chief engineer and attested by a witness. Upon its registration an easement is in existence whereby the dominant tenement may affect the servient tenement to the extent shown in the application or plans.

This procedure is simple, inexpensive and tends to bring about certainty in the tenure of land holdings.

CHAPTER 3

Acquisition of Water Rights by Administrative Decision

I. Definition of Administrative Decision

By administrative decision is meant a decision by a duly authorized officer of the Crown whereby a legal relation or right is created. It does not include commercial transactions by the Crown as, for instance, sales which, although necessitating a decision by an officer of the Crown, usually are governed by the rules of contract. Nor does it include expropriation which may necessitate a decision by an officer of the Crown, but which is characterized by forceful transfer of an interest legally vested in another person.

Legislation has been introduced which with certain exceptions transfers the property in the water within the provinces to the Crown.[1] Administrative decision is therefore today one of the most important methods whereby water rights may be acquired. The main reason for this legislation is the scarcity of water and its importance, for the economy of the provinces. The leading principle for allocation of water by administrative decision as expressed in this legislation is the most beneficial use of the water in the public interest.[2]

The main statutes authorizing allocation of water by administrative decision are for Alberta, the Water Resources Act, R.S.A. 1955, c. 362, for Saskatchewan, the Water Rights Act, R.S.S. 1953, c. 48; and, for Manitoba, the Water Rights Act, R.S.M. 1954, c. 289, which will be dealt with in the following.

II. Procedure for Acquisition of Water Rights by Administrative Decision

An application in writing, setting forth the nature and purpose of the proposed diversion or works in such form and containing such particulars as prescribed by the Minister, must be filed with him.

Depending upon the nature of the right applied for and the proposed works the proceeding may fall in three steps: preliminary permit, interim license, and final license.

Preliminary permit is in the Minister's discretion granted by him upon receipt of the above application. The object of a preliminary permit is to enable the applicant to make inquiries necessary to plan and prepare the proposed work and authorizes him to enter upon private and public land for the purpose of making those inquiries.

Interim license is initiated by a second application with detailed plans and specifications of works necessary for the utilization of water to be diverted. The application must be accompanied with written permission from the proper authorities where the proposed works will affect any road allowance, public highway, square or other public place.

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[1] See Chapters 9 and 10.

[2] See for Alberta, R.S.A. 1955, c. 362, s. 11 sets out a scale of precedence according to the degree of public benefit attached to the different types of use. S. 12 authorizes i.e., the Lieutenant Governor in Council to change the order of precedence where it is necessary in order that the water may be used to the best advantage and best in the public interest. Saskatchewan and Manitoba have provisions expressing the same basic principle in R.S.S. 1953, c. 48, s. 14 and R.S.M. 1954, c. 289, s. 10, respectively.

Notice of the filing of the application is to be published. This may be done by posting of the notice in the office of the secretary-treasurer of the municipality within which the site is located, in addition to two copies of the notice being posted by the applicant at the site of the proposed work. The notice may alternatively be published in a newspaper. Publication of notice may be waived by the Minister if the estimated costs of the works are $10,000 or less. The object of the publication is to give persons likely to be affected an opportunity to object to the works, which must be made to the Minister within thirty days from the first publication and state the reasons for objecting.[3]

An interim licence may then be granted authorizing the construction of the works.

The works are upon completion of construction inspected, and if found satisfactory and in accordance with the application, certified by the chief engineer. Upon receipt of the certificate the Minister shall issue a licence to the applicant for the quantity of water to which he is entitled, and the licence shall be recorded in the department.

III. Precedence Between Water Uses

(i) *Alberta*

Diversion of water may be granted for the following purposes, enumerated in their order of precedence: domestic purposes, municipal purposes, industrial purposes, irrigation purposes, water power purposes, and other purposes, s. 11(3). The term "other purposes" may either mean "all other purposes" or carry a more restricted meaning according to the so-called ejusdem generis rule of construction. The essence of this rule is that a general term following particular terms will be interpreted so as to include only subject matter of the same genus or category as expressed by the particular terms where those terms can be reduced to one common category, and provided the intention of the draftsmen does not otherwise appear from the document to be interpreted.[4] The intention of the legislature on this point has not been otherwise expressed by the statute nor does it follow by implication. The answer will therefore depend upon whether domestic, municipal, industrial, irrigation and water power purposes can all be referred to one common category, in which case the "other purposes" must also refer to the same category. This question has not been judicially decided.

Applications take precedence according to the respective dates of filing and are numbered consecutively in the order in which they are filed.

Licensees shall have priority among themselves according to the number of their licenses, s. 37. Effect to these provisions can only be given if the licenses are numbered according to the date of the filing of the applications, and for applications filed on the same date according to the purpose. The precedence between licenses where applications are filed on the same date for the same purpose is probably a matter of administrative discretion.

The Minister may cancel prior licenses against compensation for damages and allocate the water to a preferred purpose, s. 11(4), (5), (6).

The rules of precedence between uses might defeat the object of most beneficial use where the water in question is particularly apt for utilization for a purpose of low precedence, as for instance, where a waterfall due to natural circumstances can be put more economically to account if used for

[3] The case of Rucker v. Wilson (1923) 3 W.W.R. 130 deals with the discretion of the comptroller to refuse to hear objections, administrative appeal, and the jurisdiction of the courts to entertain appeal from the decision of the comptroller under the statutes of B.C.

[4] See f.i. Sandiman v. Breach, (1827) 7 B. & C. 96 and Tillmanns & Co. v. Knutsford Ltd., (1908) 2 K. B. 385.

development of water power than for any other purpose. The Lieutenant Governor in Council is therefore given power to reserve any unappropriated water the property in which is vested in the Crown in the right of the province in order that he may determine how the water may be used to the best advantage. He may, thereafter authorize the allocation of the whole or any part of the water so reserved as he may deem best in the public interest. He may also prescribe the relative order of precedence. Licenses granted pursuant to these rules are not subject to cancellation or diminution in favor of a preferred use unless the license so stipulates, s. 12(3).

(ii) *Saskatchewan*

Diversion of water may be granted for the following purposes enumerated in their order of precedence: Domestic purposes, municipal purposes, industrial purposes, irrigation purposes, other like purposes, mineral water purposes and mineral recovery purposes, s. 14. By using the term "other like purposes" the legislature has expressly stated its intention that the other purposes for which water may be granted must be like domestic, municipal, industrial or irrigation purposes, and the limitation it creates must therefore apply whether or not the particularly enumerated purposes are found to belong to one common category.

Use of water for water power purposes is governed by the Water Power Act, R.S.S. 1953, c. 49. No scale of precedence among water power and other uses is provided for. The priority between administrative grants for water power purposes and other purposes must therefore depend upon which grant is first in time.

For other purposes the priority depends upon the number of the licenses, and as the time of filing the applications is without importance, the licenses must be numbered according to the precedence of purpose among the existing applications at the time the grant is made, s. 39. Allocation among applications for the same purpose is probably a matter of administrative discretion even if the applications are of different date.

Water rights may be cancelled against compensation and granted to a preferred purpose.

Where water, the property in which is vested in the Crown, is specially suited to a particular use, the Lieutenant Governor in Council may alter the order of precedence, s. 14(4). He may also reserve such unappropriated water in order that he may determine how the water may be used to the best advantage and authorize the allocation of the whole or any part of the water so reserved as he deems best in the public interest and prescribe the relative order of precedence of the allotments made in the allocation.

(iii) *Manitoba*

The right to divert water may be acquired for the following purposes, set out in their order of precedence: domestic purposes, municipal purposes, industrial purposes, irrigation purposes, and other purposes. The term "other purposes" must be given a similar interpretation as in Alberta.

Applications take precedence according to the respective dates of filing. If filed on the same date the applications take precedence according to the purpose. Use of water for water power purposes is governed by the Water Power Act, R.S.M. 1954, c. 288. No scale of precedence among water power and other uses is provided for and the priority between such administrative grants must here, as in Saskatchewan, depend upon which grant is first in time.

A water right may be cancelled in favor of a preferred purpose against compensation.

The Lieutenant Governor in Council may reserve any unappropriated water the property in which is vested in the Crown, in order that he may determine how the water may be used to the best advantage. He may thereafter authorize the allocation of the whole or any part thereof as he may deem best in the public interest. He may also prescribe the relative order of precedence of the allotments made in the allocation, s. 10, cpr. s. 1.

IV. Limitations on Allocation of Water by Administrative Decision

Water rights which may be acquired by administrative decision are limited to such rights as are vested in the Crown in the right of the province in question at the time of the making of the allocation.[4]

This excludes allocation of water vested in the Crown in the right of Canada.[5]

It excludes also water rights reserved by the legislation transferring the property in water to the provinces as well as water rights of owners of land adjoining water to the extent that these rights are recognized.[6]

V. Priority Between Water Users

The water users have priority among themselves according to the number of their licenses. The holder of the lowest number may exhaust the quantity of water granted by his license before the holder of a higher license number is entitled to take out any water.

Where the license is limited in time the right to the water as well as its priority will cease when the time limit is reached, see Chapter 2, note 13.

Water licenses granted for specific purposes have priority only to the extent water is required for that purpose. Thus in the case of Morens v. Board of Investigation, (1915) 31 W.L.R. 468 (B.C.) Galliher, J.A. held that "a pre-emptor having as such acquired a water record for a specific purpose, namely, the irrigation of certain lands, cannot apply that record to after acquired lands without a new application and record, and that any other person acquiring a record in the interim would have priority of rights as against user on the after acquired lands."

The extent of the right and consequently the priority, is also limited to the capacity of the works constructed for its utilization.

The rule of priority according to number applies only to licenses dealing with the same, or related waters, not to licenses dealing with distinct or unrelated sources of water supply: Kenworthy v. Bishop (1925) 3 W.W.R. 183 (B.C.). The plantiff was entitled under two licenses to take out a quantity of water from a creek called China Creek. The defendant's license authorized him to take out a quantity of water from a different source and conduct it through China Creek to his land. The defendant's licenses were prior in time to the plaintiff's but this was held to be without any bearing on the case since each pair of licenses dealt with distinct and unrelated waters. Macdonald, J.A. stated that the person for whose benefit works have been constructed causing

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[4] Alberta: R.S.A. 1955, c. 362, ss. 11(1), 2(d).
Saskatchewan: R.S.S. 1953, c. 48, ss. 14(1), 2(5).
Manitoba: R.S.M. 1954, c. 289, ss. 10(1), 2(d).

[5] For instance, water in national parks. But certain rights concerning such water can be acquired by grants from the Crown in the right of the Dominion under special acts.

[6] See Chapter 10.

intermingling of water from different sources must measure the water at the point of diversion into the common reservoir and at the point where it is taken out, and take out only the quantity put in after allowing for seepage, etc. He also held that the burden of proof was on the defendant.

VI. Works as Constructed Differing from Work as Authorized

Where works as constructed differ from the authorized plans the question may arise whether the legality of the works is affected. In the case of Wilson v. Municipality of Delton (1912-13), 22 W.L.R. 931, the construction of a dyke and ditch by a municipality for the purpose of flood control had been authorized under by-laws passed pursuant to the Municipal Act then in force in B.C. Certain variations were made in the general plan of the works during their construction, and a landowner whose land had been flooded claimed damages on the basis that the works had been illegally constructed. The Privy Council held the variations to be incidental to carrying out the authorized works and went on to say that "it is the duty of the public body entrusted with the construction of such works to avoid causing unnecessary inconvenience to members of the public affected by the works; and, where local adjustments and variations of the general plan can be made without affecting its suitability for its intended purpose or its de facto compliance with the description of the works authorized, it is right to make them, if they diminish the interference with the convenience of individuals, and so lessen the amount of compensation to which they would become entitled. In each particular case the propriety of such special variations will be a matter dependent on the facts of that case."

VII. Terms and Conditions of Water Licenses

The holder of a water license is bound by its terms and conditions. In the case of Granby Consolidated Mining, Smelting & Power Co. Ltd. v. West Kootenay Power & Light Co. Ltd., (1928) 3 W.W.R. 301 (B.C.) water licenses provided that the territory within which power to be generated by the use of the water thereby granted might be sold was limited to an area within 50 miles of a certain place. A statute imposed a duty on the license holder to supply electricity and electric power to any premises lying within 50 yards of any main supply wire or cable. The plaintiff whose premises was within 50 yards of a main supply wire but outside the 50 miles territorial limit was held not entitled to an interim injunction restraining the defendant from cutting off the power supply since this would have been contrary to the terms and conditions of the license and therefore illegal.

CHAPTER 4

Acquisition of Water Rights by Expropriation

I. Definition of Expropriation

By expropriation is meant legally authorized forcible acquisition of another person's rights against compensation. Expropriation is authorized under a variety of federal and provincial enactments. Only expropriation pursuant to the main statutes of the provinces will be dealt with in the following.[1]

The leading principle underlying acquisition by expropriation is the most beneficial use of water in the public interest.

II. Expropriation of a Right to Supply of Water

A person requiring water for a purpose which has precedence over the purpose for which it is used[2] may with the approval of the Minister have the right in question cancelled or diminished. The right may then be granted to the applicant and given the same priority as the right which it replaces against payment of compensation to the owner of the right.[3]

A person "authorized to take land compulsory for specified purposes, will not be permitted to exercise (his) power for different purposes, and if (he) attempts to do so, the Courts will interfere," as per Duff, J. in the case of Campbell v. Sydney Mun. Council (1925) 1 W.W.R. 660, (1929) A.C. 338, 94 L.J.P., c. 65.[4] This rule has been strictly applied even though the plaintiff's damages were merely nominal. It applies as well to water as to land.

The real purpose of an expropriation was in issue in the case of Geo. Jackson Ltd. v. Union Estates Ltd. (1940) 1 W.W.R. 348 (B.C.). The defendant was authorized to divert water for "waterworks" purposes. By a tripartite agreement between the defendant, a power company and the comptroller the power company was authorized to divert water from a dam which the defendant was authorized to construct and maintain. The maximum quantities which the defendant and the power company were respectively entitled to divert were in proportions of 1 to 9. The dam fell in disrepair and the defendant instituted proceedings for expropriation of adjoining lands for the protection of the works. The plaintiff brought an action to restrain the expropriation proceedings, claiming that these were ultra vires the defendant for the reason that the defendant was authorized to divert water for "waterworks" purposes only, whereas it was in reality diverting water in a much larger measure for the power purposes of the power company. The claim was refused by the court. The defendant's obligations under the tripartite agreement were conditions attaching to his license which it was necessary to fulfill to realize the purpose of operating the waterworks.

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[1] Alberta: Water Resources Act, R.S.A. 1955, c. 362.
Saskatchewan: Water Rights Act, R.S.S. 1953, c. 48.
Manitoba: Water Rights Act, R.S.M. 1954, c. 289.

[2] See as to preferred purposes, Ch. III.

[3] Alberta: s. 11(4), (5), (6), cpr. s. 84(6).
Saskatchewan: s. 14(4), (5).
Manitoba: s. 10(4), (5).

[4] Galloway v. The Major & Commonalty of London (1866) L.R. 1 H.L. 34.

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In the case Horwood v. Town of Canora (1934) 2 W.W.R. 348 (Sask.) expropriation proceedings were sought set aside as being ultra vires on the ground that in expropriating the water supply in question the town did so for other than municipal purposes, namely, for the purpose of enabling them to sell water to the Canadian National Railways. However, the Town Act under which the expropriation proceedings were taken incorporated the Municipal Public Works Act which expressly empowered the corporation to "make and carry out any agreement deemed expedient for the supply of water to a railway company." Sale of water to the Canadian National Railways was therefore held to fall within the municipal purposes for which the waterworks of the town were being operated. The rights sought to be expropriated under these provisions must have been acquired by the owner under the provisions of the respective Water Rights or Water Resources Act.[5]

Where the Lieutenant Governor in Council has reserved water for special allocation contrary to the general rules of precedence and water rights have been granted pursuant thereto, such rights are exempted from expropriation unless provided for in the permit or licence granting the right, Alberta s. 10(7). The Saskatchewan and Manitoba statutes contain no similar express provision but the same result must probably follow. It appears to be contrary to the object of the statutes in question first to authorize the Lieutenant Governor in Council to allocate the whole or any part of water contrary to the general rules of precedence where this is deemed best in the public interest and then to subject to expropriation the water allocated under the exercise of this authority.[6]

III. Expropriation of Interests in Land for the Purpose of Construction of Works

Lands or interest in land required for the purpose of constructing works which have been authorized under the respective Water Rights & Water Resources Acts may be expropriated by the applicant. The necessity of acquiring the lands must be shown by the maps or plans filed with the application[7] and the Minister or an officer designated by him is the sole arbiter as to the area of land which may be taken.[8]

The land or interest required may as a general rule be expropriated without regard to whom the property is vested in, including the Crown in the right of the provinces but probably not the Crown in the right of Canada.

Special provisions apply where highways or other public places subject to the jurisdiction of a municipality or other authority are affected and consent for the construction cannot be obtained on acceptable terms. Applications must in such cases be made to the Board[9] which may change the plans, fix place and mode of crossing and grant the application in whole or in part on such terms as it deems just and proper.

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[5] A water right may in Alberta also be expropriated where it has been acquired under the Irrigation Act or the Dominion Water Power Act.

[6] Saskatchewan: s. 14(8).
Manitoba: s. 10(8).

[7] Alberta: s. 30.
Saskatchewan: s. 33.
Manitoba: s. 29.

[8] Alberta: s. 34.
Saskatchewan: s. 36.
Manitoba: s. 32.

[9] Alberta: The Board of Public Utility Commissioners, ss. 20, 2(b).
Saskatchewan: Local Government Board, ss. 23, 2(2).
Manitoba: The Municipal and Public Utility Board, ss. 19, 2(a).

IV. Expropriation of the Right to Use Waterworks for Carriage of Water

The right to use any portion of works constructed, under construction or to be constructed may be acquired by any applicant for the carriage of water to his lands. Grant by the Minister is required. The grant is to be made where in the opinion of the Minister it is necessary or desirable to secure a more equitable or economical use of the available water supply and when it will not interfere with the use of the works by the owner. The grant may also authorize enlargement of the works.[10]

V. Expropriation by the Crown

(i) *Expropriation of rights required for Crown works*

The Minister may in Alberta construct, operate, maintain and repair works and undertakings within the meaning of the Water Resources Act and expropriate any land or interest in land required for the works or undertakings.[11] Similar provisions are not contained in the Saskatchewan and Manitoba statutes. But the Crown may in these provinces, provided it is authorized to construct the works or undertakings in question, avail itself of the right to expropriate given to applicants under the respective Acts. The Crown will then be bound by the same requirements as any other applicant, although the requirements of public interest and most beneficial use will be more easily met by the Crown than by a private individual or corporation.

The Crown in the right of the province of Alberta is also given wide powers to enter into agreements with municipal corporations for the purpose of certain specified works or undertakings and may expropriate any land or interest in land required for those works or undertakings.[12]

(ii) *Expropriation of water works from licensee*

The Lieutenant Governor in Council may expropriate the works of a licensee authorized under the respective Water Rights and Water Resources Acts (apart from water power works). Two provisions must be fulfilled. The expropriation must be in the public interest and no person other than the licensee who is entitled to the use of the waters of the works must be deprived of the quantity of water to which he is entitled. The works may be taken over by the Crown or disposed of in favor of some other person.[13] [14]

VI. Confiscation and Expropriation

By confiscation is meant forcible acquisition of another person's rights without compensation. The legislatures of the provinces have power to pass legislation authorizing confiscation. According to long standing practice the legislatures of the provinces will not pass confiscatory legislation apart from exceptional circumstances. This practice has led to the rule of construction that a statute will not be interpreted so as to confer a right of confiscation unless expressly stated or unless an imperative legal duty has been imposed which can only be discharged by confiscation: Leahy v. Town of North Sydney

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[10] Alberta: s. 41(1).
Saskatchewan: s. 42(2).
Manitoba: requires consent by the owner of the works: s. 30.

[11] Alberta: ss. 86, 87.

[12] The Water Resources Act, R.S.A. 1955, c. 362, s. 93 (1), (2), (3), (5).

[13] Alberta: s. 49.

[14] See the cases of Yager & Western Trust Co. v. The City of Swift Current (1916) X W.W.R. 1317 (Sask.) and Davie v. City of Victoria (1911-12) I W.W.R. 1021 regarding the question when the right to compensation accrues and the similar question when the right to abandon expropriation proceeding ceases.

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(1906) 37 S.C.R. 464. The town had by a special Act been authorized to construct certain waterworks. In diverting water for the works serious damage was caused to the plaintiff. The town claimed an absolute right to divert the water without compensation under the empowering sections of the Act. By reason of the above-mentioned rule of construction the majority of the court gave a qualified interpretation of the empowering sections, holding that where no compensation had been stipulated the powers could only be exercised in such a way as to cause no damage. From the same rule of construction the minority of the court found the diversion to be within the powers of the town but gave an extensive interpretation of the compensation section holding that it covered the damage caused to the plaintiff.[15]

A distinction must be drawn between confiscation and regulation. By regulation is meant a legally authorized restriction of a person's rights without a corresponding transfer of the rights to some other person. The above-mentioned rule of construction does not apply to regulations: Musselburgh Real Estate Company v. Musselburgh (1905) A.C. 491. A special Act provided that it should not be lawful for any person to dig or take away sand, etc., from a particular harbor except with permission of the harbor commissioners. The plaintiff argued that the statute, by reason of the above-mentioned rule of construction, must be given a qualified interpretation so as to imply an exception for private land-owners digging on their own property but this was rejected by the House of Lords.

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[15] Cpr. Champion & White v. City of Vancouver (1918) 1 W.W.R. 216.

CHAPTER 5

Acquisition of Water Rights by Use

I. The Principles Underlying Acquisition by Use

Acquisition of property by use is founded upon principles of evidential, procedural and substantive nature.

It has been previously mentioned that the use which has been made of property pursuant to an agreement has supplemental evidential effect.[1] The longer the period is, over which the use has been continued without interruption, the stronger is its evidential effect both as to the legality of the use and the extent of the alleged right.[2]

Where a certain period of prescription is stipulated procedural conveniency is added inasmuch as the investigations required by the courts in cases of dispute will be limited to the period of prescription where acquisition by prescriptive use is applicable.

The fact that property has been used for a long time by one of the parties to a dispute but not by the other party, indicates, generally speaking, that the use in question is of higher economic importance to the former than to the latter. It is from a national viewpoint desirable that property should be put to productive use, which the rules permitting acquisition by use promote. And it is as well from a national as from a private viewpoint desirable that settled economic relations should not be unsettled.

II. Various Modes of Acquisition

Use might formerly constitute the basis for acquisition of rights in three different ways: by common law prescription, by statutory prescription and by presumption of a lost grant.

The old common law prescription required possession since the year 1189, and could not validate use which must have commenced at a later date. Common law prescription is therefore not applicable to the prairie provinces.

The Alberta Limitation of Actions Act, R.S.A. 1942, c. 133, s. 51 provides that no "easement, right in gross or profit a prendre shall be acquired by any person by prescription." These provisions are wide enough to exclude acquisition by statutory prescription of water rights properly so-called, but do not include prescription of title to land as where title to foreshore is in issue, which follows the ordinary rules for prescription of land applicable in the province.[3]

The Manitoba Real Property Act, R.S.M. 1954, c. 220, s. 66(2) provides that "after land has been brought under this Act, no title thereto adverse to, or in derogation of, the title of the registered owner shall be acquired by any length

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[1] See Ch. 2.

[2] Clippens Oil Co. v. Edinburgh and District Water Trustees (1904) A.C. 64, where the Earl of Halsbury said at p. 69: "To ask for particulars of proof after such a lapse of time and to act as if it were open to make an objection that something has not been proved which might have been proved eighty years ago, if objection had been then raised, but which lapse of time has rendered impossible to be proved by living witnesses, would be to unsettle a most valuable principle of law."

[3] With regard to possession explaining paper title to foreshore, see the case of In re Quieting Titles Act, (1943) 2 W.W.R. 666.

of possession merely." This rule appears to apply not only to title to land but also to rights to easements, rights in gross and profits a prendre, as much rights would be in "derogation" of the title of the registered owner. The rule is on the other hand inapplicable to unregistered land.[4]

Each one of the three provinces has, in addition to these general prohibitions against prescription, provided that "no right to the permanent diversion or to the exclusive use of any water shall be acquired by . . . any . . . person by length of use." [5]

III. Presumption of a Lost Grant

The doctrine of presumption of a lost grant is based upon the principle that open user continued as of right for a long period of time and acquiesced in by the persons injuriously affected according to ordinary human experience must have been lawful in its origin. The courts have therefore presumed the existence of a grant which has later on been lost.[6] The doctrine of a lost grant is different from prescription in several respects. It requires user as of right, i.e., that the person exercising the use must have done so in an honest belief that he was legally entitled to the use. The time required to raise the presumption is not fixed. The case of The Queen v. Moss (1897) 26 S.C.R. 322 is an instance where the Supreme Court of Canada held user of a bridge for 35 years to be sufficient to raise the related presumption of "dedication" to the public of the bed of a navigable river for the purposes of the bridge. The presumption of a lost grant is probably also rebuttable. The doctrine has been invoked with the qualification in Ontario in the case of Abell v. Village of Woodbridge and County of York, (1917) 37 D.L.R. 352, (1919) 46 D.L.R. 513, (1921) 57 D.L.R. 81, to sustain long user of an easement for carrying water across a highway.[7]

Whether the above-mentioned enactments makes the doctrine of a presumed lost grant inapplicable to acquisition of water rights has not been decided by the courts of Alberta, Saskatchewan and Manitoba or the Supreme Court of Canada. In the case of Les Soeurs de Misericorde v. Tellier 40 Man. R. 351 the Manitoba Court of Appeal decided that the Real Property Act, s. 83 (now R.S.M. 1954, c. 220, s. 66(2)) precluded acquisition by statutory prescription. Robson, J.A. remarked that "at least some colour of title must have been present and—the uninterrupted possession for the statutory period may then be important in buttressing the defective title." But the doctrine of a lost grant was not sought to be invoked in that case, nor were the provisions of the Water Rights Act in issue.

If the doctrine is held to apply notwithstanding these enactments, the use must be such as to correspond with the nature of the right claimed. The right would in most cases of practical importance be claimed as an easement.

(i) An easement must ordinarily be of benefit to a dominant and burdening on a servient tenement. In the case of Watson v. Jackson, 5 O.W.N. 845, 6 O.W.N. 509, the plaintiff sought to invoke the doctrine of a lost grant to validate the building of a dam. The Court of Appeal held the doctrine

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[4] The case of Morrison v. Weller (1951-52) 4 W.W.R. (N.S.) 160 held that an easement to discharge surface water could not be acquired by prescription under an almost identical enactment from B.C. See also Smith v. National Trust Co. (1911) 20 Man. R. 522, 17 W.L.R. 354.

[5] Alberta: Water Resources Act, R.S.A. 1955, c. 362, s. 9.
Saskatchewan: Water Rights Act, R.S.S. 1953, c. 48, s. 11.
Manitoba: Water Rights Act, R.S.M. 1954, c. 289, s. 8.

[6] "It is not that the court really thinks a grant has been made, but it presumes the fact from a principle of quieting possession:" Eldridge v. Knott (1774), 1 Cowp. 214 by Lord Mansfield, as per Masten, J. in Abell v. Village of Woodbridge & County of York (1917) 37 D.L.R. 352, 359.

[7] Cpr. Re Ottawa Gas Co. and City of Ottawa (1920) 54 D.L.R. 623, 630.

inapplicable as it had not been established by evidence that the plaintiff's use of a former dam had imposed any extra burden on the defendant. In the case of Simpson v. Godmanchester Corporation (1897) A.C. 696, the question was raised whether an easement could be acquired by use when other tenements to which no easement attached benefited by the use. The use consisted in the opening of locks upon a river whenever a flood was imminent whereby other tenements also benefited. This was held by the House of Lords not to constitute any bar to the acquisition of the easement. Lord Watson said *inter alia* at p. 702: "It is no doubt one of the most essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate. But there is no law to the effect that an easement, which is serviceable and beneficial to that estate, shall cease to exist whenever from the very nature of the right its exercise by the dominant estate confers, or tends to confer, some benefit upon other lands or tenements."

No easement can be created by use where the use is exercised for the benefit of both tenements. In the case of the Proprietors of the Staffordshire and Worchestershire Canal Navigation v. The Proprietors of the Birmingham Canal Navigations (1866) L.R. 1 H.L. 254, two canal companies had been using certain communicating locks on the canals for the purpose of letting boats through from one canal to the other. Incidental to the use the canal situated on the lowest level received the benefit of surplus water to which the canal company claimed to have acquired a right by use. This was refused by the House of Lords *inter alia,* for the above-mentioned reason.

In the case of Attorney General of Southern Nigeria v. John Holt & Co. Ltd. (1915) A.C. 599, the question came before the Privy Council whether an easement could be acquired by use where the respondent had exercised the use in the erroneous belief that he was the owner of the servient land. The use consisted in storing for a period exceeding 50 years of coopers' stores, casks, trade goods and produce on accreted foreshore, the property in which the respondent mistakenly believed had accrued to himself. The question was answered in the negative but substantially the same result was reached by presuming an irrevocable perpetual licence to the use in favor of the respondent. It is therefore a possibility that the courts will protect a long established use by means of this device, although it does not meet the ordinary requirements of an easement.

(ii) From the original basis of acquisition of rights here dealt with—the presumption of a lost grant—is drawn the conclusion that the rules are inapplicable unless the use could have been legally granted by the person against whom the rules are sought to be invoked.

In the cases of Butterworth v. West Riding of Yorkshire (1909) A.C. 45 and George Legge & Son Ltd. v. Wenlock Corporation (1938) A.C. 204, the House of Lords decided that the right to pollute rivers and streams could not be acquired by use subsequent to the passing of statutes preventing such use. In the latter case Lord Maugham said (at p. 222): "There are also cases where by the doctrine of a lost grant or lost patent or some similar presumption individuals have, notwithstanding the terms of a statute, acquired rights apparently in contradiction of it. There is, however, no case in the books in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrong-doer." Whether or not the provisions of a statute can be waived will depend upon whether the statutory provisions are mandatory or directory only.

(iii) A burden cannot be created by use. Thus in the case of Simpson v. Attorney General (1904) A.C. 476, Lord Macnaghten said (at p. 491): "It is true that the Court will go almost any length to support a right openly

asserted, long continued, and never before contested if it can find any legal origin for such a right. But the converse does not hold good in the case of a burden however long it may have been borne." In the great case of gleaning, Steel v. Houghton, Heath J. says: "If A and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair unless he is so bound by the tenure of lands or the like."

It may be observed that the word burden in this rule cannot be carried to its logical conclusion. Every right represents in one sense a burden on some other person. It is, for instance, part of the legal definition of an easement that it is burdening on the servient tenement. But it follows from the context that the burden must be in the nature of a personal obligation in order to be precluded from receiving a legal foundation through use.

CHAPTER 6

Extent of Water Rights

I. Extent of Water Rights Primarily Dependent upon Acquisition

The extent of most water rights depends in the first instance upon the acquisition. Thus if a right has been acquired by agreement the extent of the right will depend upon an interpretation of the agreement and its surrounding circumstances. Similarly, where a right is acquired by administrative decision or expropriation the extent of the right will, in the first instance, depend upon an interpretation of the administrative decision and the expropriation award, respectively. In the former case the application made by the grantee of the right will be of importance as showing the purpose and extent of the right applied for. In the latter case, the amount of compensation is an element of importance since the compensation is generally the economic equivalent of the right taken.

The extent of a right acquired by use is to be measured by the extent of its enjoyment: John White & Sons v. F. & M. White (1906) A.C. 72 at p. 81. The person acquiring a right in such a way is entitled to continue the use in the same manner and form at the place where the use has taken place, but has no general right to encroach on the body of water to the gross amount of his previous encroachment: Alex Pirie & Sons Ltd. v. Kintore (1906) A.C. 478 at p. 484. A change in the manner, form or place of the use is not justified unless the person claiming the right is in a position to show that the change cannot by possibility affect other interests: McIntyre Brothers v. McGavin (1893) A.C. 268 at p. 277.

II. Extent of Easements

The above-mentioned rule with regard to the extent of a right acquired by use is an application of the general rule, that an easement is only available for the purpose for which it has been granted. Thus, in the case of Lord Blantyre v. Babtie (1883) 13 App. Cas. 631, the appellant, who was the owner of two locks on a stream, had granted to a millowner his whole rights of water and water power connected with the mills. The respondents purchased the millowner's water rights and proceeded to divert the water for the purposes of their waterworks, claiming a right to supply of water from the reservoirs by reason of the assignment. This was refused, Lord Halsbury saying (at p. 639) that the servitude "was one which could only be available for the purpose for which it was granted. The assignees of that servitude were not entitled to divert a single ounce of water from the lock except for the purpose of the servitude itself."

To ascertain the purpose of an easement is a question of fact. In the case of Keewatin Power Co. v. Lake of the Woods Milling Co. (1930) A.C. 640, an implied grant was held to have been made by the Crown to the respondent's predecessor in title entitling the latter to make an artificial channel carrying water from the Winnipeg River to the Lake of the Woods. No stipulation had been made by the Crown as to the size or character of the mill to be operated by means of the waterpower flowing through the channel. Sawmills, reduction mills and flour mills had in turn been operated by the water power without

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objection. Under these circumstances the Privy Council held that a water power easement had been granted for the purpose of milling generally, and that the respondent was entitled to use the water power to the full extent of the capacity of the channel provided it was used for the purpose of a mill. A change from one type of milling to another fell within the purpose of the easement.

III. Extent of Eeasements: Exception

From the rule that an easement can only be used for the purpose for which it has been granted there is an important exception.

A person who has acquired a right to use water for irrigation purposes by administrative decision, and any person who has acquired from a licensee water for such purposes, is entitled to use the water for domestic purposes.[1]

IV. Extent of water Rights under Administrative License

The quantity of water which a holder of an administrative license is entitled to receive is set out in the license in cubic feet or acre feet and there is in Alberta and Saskatchewan no proportionate abatement among the licensees in case of scarcity of water. Each licensee is entitled to the whole quantity of water shown on the license before a licensee holding a higher license number has any claim to a supply. This exclusive right is limited to the quantity which the water works of the licensee are capable of carrying.[2] Manitoba has no similar express rules in its Water Rights Act.

A licensee who has undertaken to supply waters to consumers and for any reason is unable to supply the full amount is under an obligation to apportion the available supply among the consumers. This rule prevents discrimination between the consumers and is important since most of the water used in the three provinces is distributed through various water users' organizations and water works corporations as licensees to the consumers who for their supply are dependent upon the licensees. The importance of the rules, the purpose and their framing as commands must lead to the rules being interpreted as imperative: they cannot be departed from by agreement between the licensee and his consumers.

The measure of apportionment is different in the three provinces. In Alberta, "the licensee shall furnish to each user the amount of water that bears to the available water the same proportion as the amount agreed to be furnished to the user bears to the whole amount agreed to be furnished to all users."

In Saskatchewan the relation between the usual supply of each water user and the whole amount agreed to be furnished to all water users affords the measure of apportionment.

Manitoba makes discrimination between the users of water regarding the proportionate quantity to be furnished to each user an offence, under certain

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[1] R.S.A. 1955, c. 362, s. 11(7).
R.S.S. 1953, c. 48, s. 14(7).
R.S.M. 1954, c. 289, s. 10(7).

[2] This rule corresponds with the rule which applies between adjoining landowners with regard to use of water for domestic purposes, at Chapter 10, II.
R.S.A. 1955, c. 362, ss. 37(1), 38(1).
R.S.S. 1953, c. 48, ss. 39(1), 40(1).

circumstances, but stipulates no measure for the apportionment. Any apportionment which is made in good faith will therefore suffice, unless a specific measure is prescribed in the license itself or the regulations issued by the Lieutenant Governor in Council.[3]

V. Existence and Extent of Certain Rights not Primarily Dependent upon Acquisition

In the following will be dealt with certain water rights, the existence and extent of which do not depend primarily upon the acquisition.

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[3] R.S.A. 1955, c. 362, s. 39(2).
R.S.S. 1953, c. 48, s. 41(2).
R.S.M. 1954, c. 289, s. 47.

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CHAPTER 7

Access to Water

I. Basis of Right of Access

The owner of land adjoining water is entitled to access to the water as a natural incident to the right to the soil itself. The basis of the right is the general rule that an owner of land is entitled to all natural advantages belonging to the land, the physical connection between land and water being regarded as such a natural advantage.

Ownership to the bed of the watercourse is no condition for the right of access. This was decided in Lyon v. Fishmongers Co. L.R. 1A.C. 662. Lyon owned property with double river frontage to the Thames. Fishmongers' Co. obtained license from an administration board to build an embankment which would have deprived Lyon of the double frontage. The administrative board derived its authority from a special statute which contained a saving clause protecting any right to which any owner of lands on the banks of the river had been previously entitled. Lyon sued for an injunction restraining the proposed work. The defence that the Thames was a tidal navigable river, the title to the bed of which was in the Crown, and that the plaintiff had no right of access not being the owner of the bed was unanimously rejected by the House of Lords.

The Lord Justices in the court below stated that they had been "unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide." But this proposition that the right of access, among other riparian rights, existed only in non-tidal waters was rejected by the House of Lords, holding that since the right arose *ex jure naturae* no special authority was required. A landowner has a right to this natural advantage of his land whether the river be non-tidal, tidal, non-navigable or navigable.[1]

The case of A.-G. for the Straits Settlements v. Wemyss (1888) 13 App. Cas. 192 decided that the right of access also attaches to land bordering on the sea.

The legal foundation of the right of access was also raised in the leading Canadian case of North Shore Rly. Co. v. Pion (1889) 14 App. Cas. 612. Pion owned land with frontage to the St. Charles, a tidal and navigable river. The Rly. Co. made their railway upon the foreshore of the river by means of an embankment depriving Pion of his frontage but without taking any part of his land. One opening was left in the embankment opposite Pion's property and one immediately outside through which the river was accessible at certain times. With that exception all access to the water was cut off. Substantial damages were awarded, their Lordships stating (at p. 621): "The same distinction (between a non-navigable and a navigable or tidal river) was contended for in Lyon v. Fishmongers Company; but the House of Lords, on grounds

[1] Cpr. Tetreault and A.-G. for Quebec v. Harbour Commrs. of Montreal and A.-G. for Canada (1926) 1 W.W.R. 398, 411.

with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream."

The importance of the right of access to water not being dependent upon ownership of the soil of the stream is seen when compared with legislation in each of the three provinces which, with certain reservations, transfers the ownership to the soil of waters and watercourses to the Crown.[2] This transfer does not affect the right of access to water. The legislation does not deal expressly with access, nor does it follow by necessary implication that a change in the right of access to water is affected. The right is also of so great importance as to require express provisions to bring about a change.

II. Condition for Right of Access

The land owned by a person claiming a right of access must be in contact with the water. The nature of this contact was raised in Lyon v. Fishmongers Co. where it was held that although the bank of a tidal river is not always in contact with the flow of the stream, the publicly-owned foreshore being left bare at low tides, the contact at high tides affords an amply sufficient foundation.[3]

In Merritt v. City of Toronto (1913) 48 S.C.R. 1, the plaintiff owned land bordering on a large tract of wet, marshy, boggy land which in its turn bordered on navigable water. Across this tract of marshy land the defendant threw up a bank of earth in excavating a channel. The plaintiff claimed that his right of access to the water was impeded or destroyed, but the Supreme Court of Canada held that no such right attached to his property. The land was not bordering on water, as a sufficient contact with the flow of water had not been established.

III. Relations Between Lessor and Lessee

Whether a lessee acquires a right of access under the lease depends upon the terms of the lease and the general rules governing leases. Thus in Duke of Buccleuch v. Metropolitan Board of Works (1872) L.R. 5 H.L. 418, the plaintiff holding as lessee recovered substantial damages when the property was deprived of access to water and river frontage the lease containing no reservation in favor of the lessor.

In Francis Kerr Co. v. Seely (1911) 44 S.C.R. 629 a city leased a water lot reserving for itself the right to build between the water frontage of the lot and the water. Subsequently the city leased a second water lot immediately outside the first. In an action by the first lessee against the second for an injunction against building on the second lot, it was held that the first lessee had no right of access, the right being reserved in the lessor.

IV. Distinction between Interference with Access and Interference with Navigation

The right of access exists as well on non-navigable as on navigable water, but it is necessary in the latter case to ascertain whether an alleged obstruction is an interference with access or an interference with navigation merely.

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[2] See Chapter 9.

[3] Followed in Rorison v. Kolosoff (1910), 13 W.L.R. 629. As to different methods of ascertaining high-water mark, see Nelson v. P.J.E. Rly. (1918) 1 W.W.R. 597 where the "visible high-water mark" was applied.

Obstruction to access is actionable without more. Interference with navigation is actionable only where special damages can be established over and above the damages to the general public.[4]

V. Distinction between Right of Access and Incident to Ownership and Personal Rights of Access

In the case of Nicholson v. Moran (1950) 1 W.W.R. 118, 127, McFarlane J. held that a distinction also had to be drawn between a right of access attaching to land by reason of the land bordering on water and a right of access not in this way connected with the land. In the latter case special damages must be shown. The plaintiff had been granted a personal right of access to and from his boat-house which had been diminished, but this was not by itself actionable as no special damages had been established.

VI. Access from Non-Navigable to Navigable Portion of Water

Where a right of access exists to water not in itself navigable but connected with navigable water, a further right of access exists from the non-navigable to the navigable portion of the water: A.-G. for the Straits Settlements (1888) 13 App. Cas. 192.

VII. The Right of Access Presupposes Accessibility

Since the basis and object of the rules of access is to give legal protection to natural advantages attaching to property the actual existence of these natural advantages is a condition precedent to the existence of the right. A right of access from a non-navigable to a navigable portion of water will therefore not be held to exist unless the navigable portion is as a matter of fact accessible for navigation purposes. Thus in the case of McFeeley v. British Columbia Electric Rly. Co. (1918) 1 W.W.R. 339 the plaintiff's access from the non-navigable to the navigable portion of water had been obstructed by the building of an embankment. The non-navigable portion of the water was connected with the navigable portion by mud flats and had never been used by the plaintiff or his predecessors in title for the purposes of navigation. Under these circumstances the plaintiff's claim for damages for obstruction to access was dismissed.[5]

VIII. The Right to Water Frontage

The existence of a water frontage may in itself represent a natural advantage of economic value even though the water is inaccessible. In the case of Duke of Buccleuch v. Metropolitan Board of Works (1872) L.R. 5 H.L. 418 the plaintiff owned land with a large garden fronting on the river Thames. The river was embanked under authority of an Act of Parliament and a large strip of dry land was formed where the river had formerly flowed up to the garden. A public road was constructed on the strip of land between the garden and the river. The plaintiff was held entitled to damages for loss of river frontage independent of his right to damages for loss of access to the river.[6]

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[4] Cpr. Baldwin v. Chaplin (1915), 34 O.L.R. 1, London v. Vancouver (City) (1935) 49 B.C.R. 328, Nicholson v. Moran, (1950) 1 W.W.R. 118.

[5] Cpr. Merritt v. City of Toronto (1913) 48 S.C.R. 1.

[6] Cpr. Lake Erie & Northern Rly. Co. v. Brantford Golf & Country Club (1917) 32 D.L.R. 219 at p. 235.

The decision in this case was based partly on the Act in question, partly on the plaintiff's rights as a "riparian owner." The rights of riparian owners have been abrogated by legislation in Alberta, Saskatchewan and Manitoba but they are not abolished. The right to river frontage is not expressly mentioned in the Water Rights and Water Resources Acts of the three provinces. Nor does it appear necessary to imply any limitation on the right of water frontage to realize the object of most beneficial use of water. Where allocation of water necessitates the complete diversion of a stream this can be achieved by expropriating the river frontage as an interest in land required for the purpose of constructing the works in question.

The cases from the western provinces dealt with and referred to above will bear out that the right of access is unaffected by this legislation.

CHAPTER 8

Accretion, Erosion and Reclamation

I. The Purpose of the Rules of Accretion

The rules of accretion serve the purpose of preserving the natural advantage of water frontage to land bordering on water and prevent such properties from being converted into inland property by acts of nature. The benefit accruing to the land retaining its water frontage is overwhelming compared with the loss from time to time of an imperceptible strip of sand, gravel, etc.

In addition to providing certainty to the individual landowners by securing the economic identity of land the rules serve the purpose, from the viewpoint of national economy, of facilitating the most beneficial use of the accretion. Small strips of land along rivers and lakes caused by accretion cannot by themselves be economically utilized whereas this will be achieved where the strips can be used in connection with existing farms, etc.

Land gained by accretion achieves economic value mainly by cultivation and when cultivated the most important component of its value is the work invested in the soil by its occupation and use. The rules of accretion afford a premium for this work and compensate owners of land bordering on water for losses caused by erosion.[1]

II. What is Accretion?

By accretion is meant gradual silting up of sand, gravel or other substance on the beach, or gradual recession of water: Stanley v. Perry (1880) 3 S.C.R. 356 at 369, A.-G. of Southern Nigeria v. Holt (1915) A.C. 599 at 615, Clarke v. City of Edmonton (1930) S.C.R. 137 at 144.

It has been said in a number of judgments that the growth of the land must be "imperceptible" in its progress. What is meant by this qualification has been dealt with by the Privy Council in Secretary of State for India v. Raja of Vizianagaram (1921) 49 Indian Appeals 67 at 71-73 and adopted by the unanimous decision of the Supreme Court of Canada in Clarke v. City of Edmonton (1930) S.C.R. 137 (at p. 148 of the report): "Their Lordships do not find it necessary... to discuss the exact meaning of the word 'imperceptible' in the English rule which provides that all accretions must be 'gradual, slow and imperceptible,' for assuming the applicability of the English rule, 'slow' and 'imperceptible' are only qualifications of the word 'gradual,' and this word with its qualifications only defines a test relative to the conditions to which it is applied." In other words, the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is, in their Lordships' opinion, correctly laid down in the judgment of Ayling J. in the present case when he says: "It seems to me *the recognition of title by alluvial accretions is largely governed by the fact that the accretion is due to the normal action of physical forces;* and the conditions of Indian and English rivers differ so much that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former..."

[1] Gifford v. Yarborough (1828) 5 Bing 163.

A similar difference exists between the rivers and lakes of Canada and those of England. As was pointed out by Beck, J.A., in his dissenting judgment in Clarke v. City of Edmonton, affirmed by the Supreme Court of Canada on appeal, accretion is to be contrasted with avulsion which is a sudden and visible removal of soil from one man's land to that of another or sudden retiral of a body of water from a wide strip of shore, or the sudden breaking of a new channel leaving the old channel bare. In such cases, where the soil can be identified the ownership to the soil remains in the original owner.

To distinguish between gradual and sudden growth of the land may necessitate inquiry into the particular circumstances of the watercourse in question, the rapidity with which the course normally changes back and forth, the quantity of alluvial material ordinarily carried by the water under normal and flood conditions, the speed and volume of the stream, as well as the characteristics of the landscape in question.

III. Accretions Caused by Artificial Means

Accretions caused by artificial means follow the same rules as natural accretions. Thus in Standley v. Perry (1880) 3 S.C.R. 356 the shoreline of property bordering on a lake was extended for a considerable distance into the sea partly as a result of crib works, deposits of material dredge from the bed of a lake, and partly as a result of natural accretion. The owner of the adjoining land was held to be the owner of the accrued land, Strong J. delivering judgment on behalf of the court, saying (at p. 369): "It can make no difference whether this land was gained by alluvian deposits arising by natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible."

It is a condition for the application of the rules of accretion that the works in question do not amount to reclamation, where different rules apply.[2] Whether or not artificial works are reclamatory will depend primarily on the purpose for which they are undertaken: Clarke v. City of Edmonton, (1930) S.C.R. 137 at 144.

IV. To Whom Accretions Belong

Accretions belong to the owner of the land to which they attach where the land is bordering on the water. Ownership to the bed of the water is no condition for acquisition of ownership to the accrued land. Attorney-General of Southern Nigeria v. Holt (1915) A.C. 599 held owners of land bordering on the sea entitled to natural accretions as against the Crown as owner of the sea-shore and the bed of the sea. The contention that the law for its operation depends upon ownership to the bed of the water was likewise rejected in Clarke v. City of Edmonton, (1930) S.C.R. 137 at 151.

The beds and shores of rivers and lakes have—as a general rule—been transferred by legislation from private to public ownership in the three prairie provinces. There is nothing in this legislation dealing directly with accretions. Nor does it follow as a matter of necessary implication that a change was intended. The main object of the transfer appears to be the acquisition and preservation for the Crown of ownership to beds of rivers and lakes as they are at any given point of time, for the purpose of facilitating allocation of water, which necessitates a fluctuation of the limits of ownership coinciding with the natural fluctuations of the rivers and lakes. This object is achieved by the combined effect of the rules of accretion and the rules of erosion.

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[2] Cpr. Attorney-General of Southern Nigeria v. Holt, (1915) A.C. 599 at p. 615.

Provisions in this legislation stipulating that grants from the Crown are not to be construed in accordance with the English Common Law are aimed at a rule of construction whereby grants of land bordering on water were construed so as to pass the ownership to the bed of the water to the middle of the stream or lake unless the grant contained express reservations. The rules of accretion did not originate and have never been treated as rules of construction.

It would lead to serious results if accretions were to accrue to the owner of the bed of the water. Such a change cannot, according to traditional interpretation of statutes, be brought about without express provisions. It follows that the rules of accretion are not affected by the legislation in question.

V. Applicability of Rules of Accretion where Boundaries of Land Otherwise Clearly Ascertained or Ascertainable

The proposition that the rules of accretion are inapplicable where boundaries of land are otherwise clearly ascertained or ascertainable has been raised and rejected in a number of different constellations.

(i) In the case of Clarke v. City of Edmonton the proposition that the doctrine of accretion is only applicable where there is no other way of ascertaining the boundaries, and therefore inapplicable where the old river bank is clearly visible and marks the original boundary line, was unanimously rejected by the Supreme Court of Canada.

(ii) In the case of A.—G. of Southern Nigeria v. Holt (1915) A.C. 599 exact measurement of the land in the title deed was held not to affect the applicability of the rules of accretion. The Privy Council remarked (at p. 611): "If accretions had been formed in the course of nature by the silting up of sand, gravel and the like... they would have been added to the land notwithstanding the measurement in square yards or feet which the title contained. The reason of this is not far to seek and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, where de facto fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet, or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property, would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage."

(iii) In the case of In re Quieting Titles Act (1954) 13 W.W.R. (N.S.) 241, (1955) 16 W.W.R. (N.S.) 625 one of the issues was the effect of the Official Surveys Act, R.S.B.C. 1948, c. 321, s. 2 providing that boundary lines surveyed or marked "shall be the true and unalterable boundaries" of the lands in question whether or not the lands upon admeasurement are found to contain the exact area or dimensions contained in the instrument conferring title. Wilson, J. held that the object of the provision was to prevent litigation arising from surveyors mistakes or errors and that the change in the basis for ascertaining the boundaries of land from the title deed to the survey or marks did not affect the rules of accretion. This decision is of importance in Alberta, Saskatchewan and Manitoba where legislation similar to the Official Surveys Act of British Columbia has been introduced.[3]

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[3] Alberta Surveys Act, R.S.A. 1955, c. 327, s. 27. Land Surveys Act, R.S.S. 1953, c. 113, s. 30; Surveys Act, R.S.M. 1954, c. 256, s. 40.

VI. Relations between Owners of Adjoining Water Lots

(i) In the foregoing has been assumed that ownership to the land bordering on water and ownership to the bed of the water are in different hands as where the land is owned by a subject and the bed by the Crown, or where land has been parcelled out by an owner of large landholdings reserving to himself the title to the bed of the water. Different considerations arise in the relationship between adjoining landowners owning as well the land as the bed of the water in front of the land. The boundary line between such properties will continue from the point where the boundary line abuts on the water and across the bed of the water. Where the accretion takes place immediately in front of the land no special problem will arise. But the situation is different where the accretion takes place first outwards into the water and then upstream or downsteam across the boundary line between the former water lots. The purpose of the rules of accretion—formulated in the Yarborough case in relation to the Crown and its subjects—is not present to the same extent in this situation. If ownership to the accretion were to go to the owner of the land to which it attaches the adjoining property might be converted into inland property. The accretion may be put to productive use almost as well by the one as by the other landowner, and there is no reciprocity between accretion and erosion. If, therefore, the purpose of a rule affords its limitation as well as its foundation, the rules of accretion must here give way to the rules governing boundaries. The adjoining landowners will then own their respective lands within the same limits when it emerges from the water as they did when it existed in the form of water lots.

(ii) Considerations similar to those mentioned above are present between parties whose landholdings consist only in water lots. When such water lots emerge from the water the ownership must be governed by the rules of boundaries and not by the incident that the land commences to emerge at one place rather than at another.[4]

(iii) In the case of Municipality of Queen's County v. Cooper, (1946) S.C.R. 584 an island in a tidal and navigable river had been extended up-river and attached to the mainland due to accretions. The property on the mainland opposite the accretions was thereby shut off from access to the river and converted into inland property. Since the bed of the river was owned by the Crown the accretions had not at any stage of the progress transgressed on the boundary lines of the mainland property. Even if the rules of accretion were to abide and title to the emerged land should remain according to the original boundaries the accretions would have passed to the Crown. No legal foundation was therefore found to exist upon which a claim by the owner of the mainland property to the accretions could be based. And as between the owner of the island and the Crown no reason existed for making any exception from the ordinary rules of accretion. Title to the accretions therefore passed to the owner of the island.

VII. Extent of Accretions

The extent of accretions coincide with the dividing line between the bed of the water and the dry land. A distinction has here been drawn between non-tidal and tidal waters.

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[4] Cpr. obiter dictum by Rand, J.S.C.C. in Municipality of Queen's County v. Cooper, (1946) S.C.R. 584 at 589: "Accretion is wholly involved in boundary and is inapplicable where that boundary is not a water line. In cases then *where the stream bed is parcelled out* in ownership by fixed or line limits, the essential condition of accretion is lacking."

(i) In non-tidal waters neither the high-water mark, nor the low-water mark, nor the middle stage of water is assumed as the line dividing the bed from banks. In the case of Clarke v. City of Edmonton (1930) S.C.R. 137 at 141, the Supreme Court of Canada adopted as the test a statement by Romer, J., in Hindson v. Ashby (1851) Howard 381 at 427-428: "I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growth and its user."

(ii) In tidal waters where the high-water and low-water marks are clearly visible the medium line has, under ordinary circumstances, been held to be the dividing line between bed and dry land.

But this test is not always applicable. Thus, in the case of In re Quieting Titles Act (1954) 13 W.W.R. (N.S.) 241, (1955) 16 W.W.R. (N.S.) 625 a large part of the land in dispute was covered by water at "mean high tide." By reason of natural embankments formed by alluvial deposits the land was capable of being put to productive use in the same way as other land in the vicinity which was being cultivated below the sea level under protection of dykes and embankments. No visible high-water or low-water marks existed. Upland growth was emerging in numerous spots. The area taken as a whole was held not to form part of the bed of the water. On appeal O'Halloran, J.A. remarked (at p. 639): "Evidence of medium high tide (particularly where that evidence is not supported by visible marks of high and low water) may be offset by other important elements such as (a) growth of herbage and vegetation; (b) capability of alluvion land to ordinary cultivation and occupation; (c) the breaking down of alluvion ramparts by action of flood tides, high winds and storms; and (d) that adjacent or nearby areas with similar characteristics have been worked into productive farm lands after dyking and draining."

VIII. Conveyance of Land without Reservation Includes Accretions

Conveyance of land without mentioning an accretion which has already taken place is effective to convey that accretion: Wolfe v. British Columbia Electric Rly. Co. Ltd. (1949) 1 W.W.R. 1123.

IX. Erosion

Where land by erosion de facto is converted to beds of rivers or lakes the owner of the bed becomes the owners of land thus converted.[5] The combined effect of the rules of erosion and accretion is therefore to ensure to the owner of the bed that the limits of ownership follow the water in its natural and gradual fluctuations.

X. Reclamation

Reclamation of land from rivers or lakes by artificial means is not governed by the rules of accretion. Ownership to the reclaimed land will primarily depend upon the authority under which the reclamation work is done. In the absence of provisions regulating the question of ownership the owner of the bed will remain owner of the land after it has been reclaimed, provided the reclamation work is legally undertaken. In the King v. Fares et al., (1932)

[5] Attorney-General of Southern Nigeria v. Holt (1915) A.C. 599 at 611.

S.C.R. 78 the C.P.R. Co. lowered the level of a lake between two and three feet whereby some 3,900 acres became dry. Subsequent to the lowering of the level the defendant bought the fractional sections bordering on the old shoreline and claimed ownership to the reclaimed land by reason of the *ad medium filum aquae* rule of construction—the rule whereby a grant of land bordering on water was construed so as to pass the ownership to the middle of the bed in the absence of express reservations. It was unnecessary for the result to decide the question since the defendants had not bought property bordering on the lake. But all the judges dealt with it and came—on different reasons—to the conclusion that the *ad medium filum aquae* rule would have been inapplicable had the land been acquired by the defendants prior to the lowering of the water level, and that the Crown as owner of the bed became owner of the reclaimed land.

CHAPTER 9

Ownership to the Bed of Water

I. Introduction

According to the English common law instruments conveying land abutting on water not navigable and tidal were construed so as to pass ownership to the bed of the water to the middle of the stream where the instrument was silent with regard to the bed. The basis for this rule in its application to Crown grants, which governed the question of private or public ownership to the bed of waters and watercourses, appears to be the absence or presence of public importance of the watercourse. For other conveyances the basis was the improbability of a person disposing of specific land and intending to retain for himself the property to the bed of water on which the land abutted without expressly mentioning it, since such beds ordinarily would be useless and valueless save in connection with the land in question.

This rule of construction (or presumption) could be rebutted by showing special circumstances evidencing an intention not to pass ownership to the bed of the water.

The rule had no application where the bed of the water was expressly dealt with in the instrument, in which case the express provisions governed: Maclaren v. A.—G. for Quebec (1914) A.C. 258 at 272.

II. The Present Legal Position

(i) *Alberta*

The Public Lands Act R.S.A. 1955, c. 259, s. 5(2), provides that "nothing in this Act or any Other Act or the rules of the English common law shall be construed to vest or to have heretofore vested in any person the land which comprises at any time the bed or shore of any lake, river or stream and notwithstanding the provisions of any certificate of title, the title to land shall be construed accordingly."

(a) This enactment is retroactive. It affects not only future but also past conveyances. Any province has, generally speaking, power to make enactments of retroactive and confiscatory nature. By the agreement transferring the natural resources within the province from Canada to Alberta, Alberta undertook not to affect or alter by legislation any term of any contract to purchase, lease or other arrangement whereby any person has become entitled to an interest in land as against the Crown. But an exception is made for legislation applying "generally to all similar agreements relating to land." [1] The scope of the enactment is therefore decisive for its retroactive validity.

(b) According to its wording the rule is general in this respect that it applies irrespective of who is or has been the party to the transactions, cpr. the term "any person." The Public Lands Act applies to all lands vested in the Crown in the right of the province "and where the content so permits, to all

[1] The Alberta Natural Resources Act 1930, c. 21, schedule, para. 2.

lands in the province," s. 3(1). The rule purports to affect the bed or shore of "any lake, river or stream," and this can only be achieved where it is applicable to all lands in the province. The rule being general also with regard to the lands affected is therefore within the limits of valid retroactive enactments.

(c) S. 5(2) abolishes the English common law rule of construction of instruments conferring title to land and the additional statutory protection given grantees of such instruments under the system of land registration in force in Alberta. But does the section also go further so as to bring about a retransfer of title to the Crown of the bed of water, which prior to the enactment did not result from the operation of that rule of construction or the rules of land registration, as where the bed has been expressly granted or acquired by use? Either interpretation is possible. S. 5(2) in its retroactive aspect is confiscatory legislation as it retransfers property from private to public ownership without compensation, and rules of confiscation are usually interpreted restrictively.

S. 6, preceding s. 5(2), reverses with retroactive effect the common law rule of construction of title to land and provides that it shall be presumed in the absence of an express provision in the grant to the contrary, that title to the bed of water has not passed to the grantee. It makes exceptions for rights which have been determined by a court of competent jurisdiction as well as rights of a person who in good faith has constructed works in the development of water power. S. 6 is limited to grants by the Crown whereas s. 5(2) extends to any grant. To interpret an enactment as being repealed by implication is contrary to traditional rules of interpretation and the exceptions made by s. 6 must therefore be considered as existing also after the introduction of s. 5(2).

(d) The main importance of ss. 5(2) and 6 of the Public Lands Act lies in their retroactive aspects, as there is now a general prohibition against grants by the Crown of the bed of water. Even an express grant cannot today convey title to the bed. The Water Resources Act, R.S.A. 1955, c. 362, s. 8(1) provides that "no grant shall be made by the Crown of lands or of any estate therein, in such terms as to vest in the grantee... any exclusive or perpetual property, interest or privilege in the land forming the bed or shore" of any water. This enactment is not retroactive.

Two exceptions are made from the general prohibition. Grants made in pursuance of a valid agreement or undertaking existing at the time the Act came into force, and dispositions of minerals in, on or under the bed or shore of the water if authorized under any other Act of the province, are not affected by the prohibition.

(ii) *Saskatchewan and Manitoba*

(a) In the case of The King v. Fares, (1932) S.C.R. 78, which arose in Saskatchewan, a majority of the judges of the Supreme Court of Canada was of opinion that the introduction of a clear cut system of surveying, inalterable boundary lines, the establishment of a fixed price per acre for sale of such lands, the restriction on acreage obtainable by homesteaders and other purchasers and the prohibition against sale of unsurveyed land in the original North West Territories were such circumstances as made inapplicable or rebutted the presumption of ownership of the land to the middle of the stream in relation to Crown grants of land abutting on water. The King v. Fares applies only to Crown grants, furthermore it follows from the reasoning that such Crown grants as have been made prior to the introduction of the legislation upon which the "clear cut system of surveying, etc.," is based do not fall within the decision.

(b) Both Saskatchewan and Manitoba have passed enactments which in essence codify the majority judgment in The King v. Fares. Every disposition of Crown lands shall be construed not to pass title to the grantee to the bed of water in absence of express provision to the contrary.[2] These enactments are not retroactive.

(c) The last step in the development of the law governing the bed of water in Saskatchewan and Manitoba is a general prohibition against sale by the Crown almost identical to the prohibition in Alberta and with the same exceptions.[3]

III. Ascertainment of Ownership to a Particular Parcel of Land Forming the Bed of Water

Ascertainment of ownership to a parcel of land forming the bed of water necessitates inquiry into the original grant by the Crown. Only by comparing that grant with the law in force when it was made can it be decided whether title passed to the grantee. If title passed to the original grantee the parcel will be privately owned unless it has reverted back to the Crown. It should be noted that ss. 5(2) and 6 of the Alberta Public Lands Act operate so as to revert title to the Crown to the extent they change former law with retroactive effect.

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[2] Provincial Lands Act, R.S.S. 1953, c. 45, s. 12.
Crown Lands Act, R.S.M. 1954, c. 57, s. 5.

[3] Water Rights Act, R.S.S. 1953, c. 48, s. 10.
Water Rights Act, R.S.M. 1954, c. 289, s. 7.

CHAPTER 10

The Adjoining Landowner's Right to Enjoy the water

I. The Basis of Adjoining Landowner's Rights

The fact that land adjoins water is considered a natural advantage attaching to the property of which the owner is entitled to avail himself. This constitutes the basis of the right of a landowner to use the water by which his land is being washed. Thus Lord Wensleydale observed in the case of Chasemore v. Richards (1859) 7 H.L.C. 140, repeated with approval by Lord Cairns in the case of Lyon v. Fishmongers Co. L.R. 1 A.C. 662: "It has been now settled that the right to the enjoyment of a natural stream of water, ex jure natura, belongs to the proprietors of the adjoining lands, as a natural incident to the soil itself and that he is entitled to the benefit of it, as he is to all other advantages belonging to the land of which he is the owner."

The Fishmongers' case decided, as was approved in the case of North Shore Railway Co. v. Pion (1889) 14 App. Cas. 612, that physical contact of the land with the water is the condition of the existence of the right, the ownership to the bed of the water being immaterial.

The legal starting point with regard to an owner's right to enjoy the natural incidents of his property is that he may enjoy them in any way he thinks fit even if the property is thereby destroyed. The rules governing a landowner's right to enjoy water flowing by or across his land is a set of limitations on the right of enjoyment which would otherwise follow. The scarcity of water in the prairie provinces, its importance for the economy and the practical impossibility of bringing all the landowners together to agree upon particular uses of water as changing circumstances might require has led to introduction by legislation of rules whereby these limitations have been materially changed.

The main provisions affecting changes are contained in the Water Resources Act, R.S.A. 1955, c. 362, s. 5(2), (3), the Water Rights Act, R.S.S. 1953, c. 48, s. 7(1) and the Water Rights Act, R.S.M. 1954, c. 289, s. 6(2) which although differently worded, prohibit any person from diverting or using water unless authorized under the statutes. The effect of these general prohibitions on the adjoining landowner's legal position is that such types of enjoyment as consist in diversion and use of water only exist to the extent exceptions have been made for them by the respective Acts.

II. Use of Water for Domestic Purposes

The adjoining landowner's right to use water for domestic purposes has been expressly saved in all the three provinces. The Alberta Act s. 5(3) provides that: "The provisions of this Act do not affect the right of a person owning or occupying any land that adjoins a river, stream, lake or other body of water upon Provincial lands, to use such quantity of that water as he requires for domestic purposes on the land..." Similar provisions are made by the Saskatchewan Act s. 7(2) and the Manitoba Act s. 6(3). "Domestic purposes" is differently defined in each province, but includes in all the provinces the watering of stock and to some extent the working of agricultural machinery.[1]

[1] Alberta: s. 2(g).
Saskatchewan: s. 2 sub—s. 7.
Manitoba: s. 2(g).

No abatement takes place in case of scarcity of water. The adjoining landowner is entitled to exhaust the water if required for such purposes. Thus in the case of McCartney v. Londonderry and Lough Swilly Rly. (1904) A.C. 301 at p. 307 Lord Macnaghten said: "In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that." [2]

There is, however, this important limitation on the adjoining landowner's utilization of water for domestic purposes that if the use requires water to be impounded or diverted the construction of the works must be authorized under the respective Acts.[3]

III. Other Types of Diversion and Use

At common law an owner of land adjoining water was entitled to use water also for extraordinary or secondary purposes. The scope of these purposes was never clearly defined. The use was qualified in several respects as was expressed by Lord Macnaghten in the case of McCartney v. Londonderry and Lough Swilly Railway (1904) A.C. 301 at 307: "In the exercise of rights extraordinary but permissible... a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

No right to divert and use water for extraordinary or secondary purposes exists by reason only of ownership to land abutting on water in Alberta, Saskatchewan and Manitoba as no such exceptions have been made by the statutes prohibiting diversion and use. Manitoba excepted originally use of water for industrial purposes (Water Rights Act, R.S.M. 1954, c. 289, s. 6(3)), but this exception has now been repealed (S.M. 1954, c. 38, ss. 9, 11).

IV. The Right to the Flow of Water

(i) At common law water as substance was not considered subject to ownership when in its natural state. Ownership to the substance arose first when the water had been reduced into possession.[4] The rights arising out of ownership to land adjoining water attached not to the substance but to the flow of water. The classical statement with regard to the adjoining landowner's right to the flow of water is contained in the Fishmongers' case (supra): "He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction." This statement needed certain qualifications. As the upper owner was entitled to use the water for ordinary purposes even if the water was thereby exhausted, the lower owner could not resist a reduction in the flow of water resulting from such use. The first part of the rule was therefore collateral to the rule governing the upper riparian owner's right to use water for secondary purposes. Since the upper owner, using water for such purposes, was under obligation to restore the water substantially undiminished in volume it followed that the lower owner was entitled to receive the flow of water substantially undiminished in quantity.

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[2] Cpr. the remarks of Lord Cairns to the same effect in the case of Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co. (1875) L.R. 7 H.L. 697 at 704. This rule corresponds with the rule which applies between license holders, see above, Chapter 6, IV.

[3] Alberta: s. 5(4), (5).
Saskatchewan: s. 7(2), i.f.
Manitoba: s. 6(3), i.f.

[4] Embrey v. Owen (1851), 6 Ex. 369.

This type of enjoyment does not fall within the general prohibition against use or diversion introduced by Alberta, Saskatchewan and Manitoba. It was a negative right entitling the lower owner to prevent diversion and use of water by the upper owner. It appears nevertheless that this right has been taken away as against the Crown and grantees from the Crown. The Water Resources and Water Rights Acts of Alberta, Saskatchewan and Manitoba have as their object the introduction of a completely new system of allocation of water. Except for the use of water for domestic purposes its use is not to be decided by the adjoining landowners but by an administrative body according to the principle of most beneficial use. The administration is authorized to allocate water for domestic, municipal, industrial, irrigation (and water power) purposes. Many of these uses result in partial or complete consumption of the water. It is impossible for this system to function without at times affecting a sensible diminution of the flow of water. The Alberta Act s. 5(1) declares the property in the water in the province to be vested in the province. The Saskatchewan Act s. 6 and the Manitoba Act s. 6(1) provide that the property in the water in the provinces is to be deemed vested in the Crown until the contrary is established. The importance of these provisions will be seen when compared with the case of Cook v. Vancouver Corporation (1914) A.C. 1077 where the Privy Council decided that legislation vesting the water of British Columbia in the Crown in the right of that province had the effect of removing the adjoining landowner's right to the continuance of the undiminished flow of water as against a licensee from the Crown.

(ii) The removal of the right to the undiminished flow of water does not mean that the adjoining landowner is entitled to no flow of water at all. Since the adjoining landowner still has the right to use water for domestic purposes, it follows that the flow of water cannot be reduced below what is required for these purposes by administrative allocations. This is expressly provided for by the Saskatchewan and Manitoba Acts: "No application for any purpose shall be granted where the proposed use of the water would deprive any person owning lands adjoining the river, stream, lake or other source of supply of whatever he requires for domestic purposes."[4] The same must follow also in Alberta without express enactment. The reservation of the adjoining landowner's right in this respect would otherwise be ineffective.

(iii) The landowner must also be entitled to the flow of water to the extent it is necessary for the support of his land. Extraction of water causing subsidence or other injury to the land cannot be lawfully made by the holder of an administrative license, unless, in addition to the license, a right to cause the injury has been acquired by agreement with the owner (express, implied or presumed) or by expropriation.

(iv) The considerations leading to a removal of the adjoining landowner's right to the undiminished flow of water as against the Crown and persons claiming under the Crown do not apply in relation to a person who makes an unauthorized diversion or use of the water. Such diversion and use is prohibited in each of the three provinces and the existence of the right to the undiminished flow of water as against the wrongdoer sustains the statutory purpose of channelling allocation of water through the proper administrative agencies. Thus in the case of Johnson v. Anderson & Anderson, (1937) 1 W.W.R. 245, the defendant had unlawfully diverted water from a stream. The plaintiff brought an action as owner of land bordering on the stream. Under legislation similar to that in force in Alberta, Saskatchewan and Manitoba, Fisher, J.

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[4] Saskatchewan: s. 15.
Manitoba: s. 11.

disapproved of the defendant's contention that the legislation had the effect of taking away absolutely the adjoining landowner's right to the undiminished flow of the water, holding that the right had been taken away only in relation to administrative water records (or licenses).

(v) The rule in the Fishmongers' case also provided that the adjoining landowner was entitled to have the flow of water continued unincreased. In the case of Frechette v. La Compagnie Manufacturiere de St. Hyacinthe (1883) 9 A.C. 171 the upper landowner had executed certain works in a river which had the effect of accumulating the volume of water, and probably of increasing the depth of its channel. His claim, i.a., for a declaration of right to have the accumulated volume of water discharged uninterrupted was dismissed. As no special legal ground had been established, the situation was governed by the general rule that the adjoining landowners were entitled to have the stream continued in its natural state in flow and quantity.

An increase in the flow of water will cause injury to land in this sense that land will be submerged to a greater or lesser extent. The vesting of ownership to water in the Crown in the right of the provinces and the introduction of the new system of allocation of water by administrative licenses do not necessitate the removal of the adjoining landowner's right to have the flow of water continued unincreased, or create a new right in the Crown and its assignees to submerge land by increasing the flow of water. Nor is the decision in Cook v. Vancouver Corporation applicable, being a case dealing with extraction of water not causing injury to adjoining land.

The Alberta Act s. 31 provides: "Where any authorized works require the flooding or other use of land, incidental to the undertaking, and such land is owned by a person other than the Crown, the applicant or licensee may, with the consent of the Minister, expropriate the land." This right of expropriation assumes the adjoining landowner's right to the unincreased flow of water, as it would otherwise be unnecessary to introduce rules for the expropriation of the right.

The Saskatchewan and Manitoba statutes have general provisions authorizing expropriation of any interest in land required for the works of an applicant in ss. 33 and 29(1) respectively, which appear to be wide enough to authorize expropriation of a right to flood adjoining land. It is in the public interest that works requiring flooding of adjoining land should be capable of execution, where such works are necessary to promote the most beneficial use of water, but it is also in the public interest that the expense should be borne by those for whose particular benefit the works are executed and not by those who happen to own land adjoining the water.

The Water Resources and Water Rights Acts of Alberta, Saskatchewan and Manitoba must therefore be interpreted as not having taken away the adjoining landowner's right to the unincreased flow of water. Acquisition by agreement or expropriation is necessary where such a right is required.

(vi) The right to discharge water uninterrupted is the counterpart to the right to receive water in an unincreased quantity. As an increased volume of water higher up the stream may cause land to be submerged lower down, so may the building or a dam or other obstruction to the flow of water cause land to be submerged higher up the stream by penning the water back. The right to discharge the water uninterrupted is therefore preserved for the same reasons as the right to receive the water in unincreased quantity.

(vii) Drainage and pollution will be dealt with below. It will be seen that a right to drain land into water imposes a qualification on the right to receive water in an unincreased quantity.

V. Exceptions from General Prohibitions against Diversion and Use

Certain water rights authorized by virtue of Dominion licenses prior to the transfer of natural resources to the provinces are saved from the general prohibitions against diversion and use.[5]

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[5] Alberta: ss. 5(3), 10.
Saskatchewan: s. 12.
Manitoba: s. 9.

CHAPTER II

Drainage

I. Natural Drainage

(i) By natural drainage is meant water caused by rain or melting of snow which flows from the upper to the lower land by reason only of the natural difference in elevation of the lands, whether in a defined channel or not.

The important question is whether the upper owner is entitled to have this natural drainage continued undisturbed. It will be seen that if the lower owner is entitled to disturb the natural drainage by construction of works penning the water back a serious problem is created for the upper owner. The water must then either remain on the upper land until it evaporates or percolates underground, or if possible, be drained back into the ground by costly drainage works. The seriousness of the problem is particularly poignant where the degree of elevation of lands is very low as is the case in many parts of Alberta, Saskatchewan and Manitoba.

(ii) *Saskatchewan*—Judicial opinion has been divided as to the common law rule governing natural drainage. In the case of Edwards v. Scott (1934) 1 W.W.R. 33, Martin, J.A., delivering judgment on behalf of the Court of Appeal held that at common law a distinction had to be drawn between water flowing in a defined channel and surface water moving into lower areas without any such defined channel for the course of the water. Only in the former case was the upper owner entitled to have the discharge continued undisturbed. In the latter case the lower owner was entitled to prevent the water from flowing on to his land by erection of embankments or otherwise.[1] Following the decision in Edwards v. Scott an amendment to the Water Rights Act was introduced (S.S. 1934-35, c. 19, s. 2) providing that "no person shall divert or impound any surface water not flowing in a natural channel or contained in a natural bed and no person shall construct or cause to be constructed any dam, dyke or other works for the diversion or impounding of such water, without having first obtained authority to do so under the provisions of this Act." Furthermore, it was provided that if a person diverted or impounded surface water contrary to the above prohibition "such person shall be liable to a civil action for damages at the instance of any person who is or may be damnified by reason of such diversion impounding or construction."[2] The result of this enactment is that the distinction between surface water not flowing in a defined channel and surface water having such a defined channel is done away with as far as drainage is concerned. In neither case can the discharge of the water be disturbed without incurring legal liability unless authorized under the Act. In the cases of Baker v. Lajord R.M. (1950) 2 W.W.R. 978 and Campbell v. Monet R.M. (1955) 15 W.W.R. (N.S.) 442 the Court of Appeal of Saskatchewan refuted the contention that the enactment does not apply to rural municipalities which in the exercise of their statutory powers to build roads obstruct the flow of drainage water. In the first case the

[1] The decision is affirmed by the Supreme Court of Canada (1934) S.C.R. 332 without special reasons but with approval of the reasons stated by Martin, J.A. in the Court of Appeal.

[2] Now R.S.S. 1953, c. 48, s. 8.

municipality filled in a culvert across a road thereby impounding the drainage water. In the second case, the municipality covered a culvert which subsequently became blocked. In both cases the municipality was held liable for damages by flooding of land caused by the impounding and diversion.[3]

(iii) *Alberta*—The doctrine in Scott v. Edwards is founded upon decisions from Ontario which in their turn are based upon decisions from Massachusetts. The courts of Alberta have repeatedly refused to follow the doctrine. Thus in the case of Makowecki v. Yachimyc (1917) 1 W.W.R. 1279, the so-called civil law doctrine was adopted, defined by Beck, J. (at p. 1294) as follows: "By the civil law, the right of drainage of surface waters, as between owners of adjacent lands of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude." This decision is followed in Farnell v. Parks (1917) 2 W.W.R. 44.[4] There are in the House of Lords' decision in John Young & Co. v. Bankier Distillery Co. (1893) A.C. 691 dicta to the same effect. Lord Watson said (at p. 696): "The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbor's property by artificial means... The law of Scotland upon this point is the same with that of England. In Blair v. Hunter, Finlay & Co., Lord Gifford said: "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

(iv) *Manitoba*—The Ontario-Massachusetts doctrine has been adopted in Manitoba in the case of Wilton v. Murray (1897) 12 Man. R. 35 and again in Hudson's Bay Co. v. Horanin, (1926) 1 W.W.R. 460. It does not appear to have been changed by legislation. Unless the John Young case will be followed it becomes necessary to distinguish between water flowing in a defined channel and other water. A landowner is entitled to have the discharge of water continued uninterrupted in the former case but not in the latter.[5]

II. Artificial Drainage

(i) A land owner was at common law entitled to construct works required to drain land into an adjoining watercourse being the natural and only outlet for such water provided the works adopted were reasonable under the circumstances and subject to the rules of pollution. The lower proprietor had then no right of action if his lands at times became flooded by the increased flow of water.[6] This right does not appear to be affected by legislation relating to water in Alberta, Saskatchewan and Manitoba.

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[3] Similarly in the case of Yarie v. Kelvington R.M., (1950) 2 W.W.R. 444 the rural municipality was held responsible for flooding caused by obstructing the flow of a creek under a road bridge. See also Dyke v. Rosetown (1956-57) 20 W.W.R. 1.

[4] See also Townsend v. C.N.R., (1922) 1 W.W.R. 1121. A railway which in exercise of its statutory powers had built an embankment was held liable for damages caused by flooding.

[5] Cpr. Badger v. Cooper and Cooper, (1952-53) 7 W.W.R. (N.S.) 529.

[6] Groat v. City of Edmonton, (1928) S.C.R. 522 at 532.
Romanica v. Greater Winnipeg Water District, (1921) 2 W.W.R. 399.

(ii) Drainage works in excess of common law rights may derive their legal validity from agreement,[7] use, expropriation, from proceedings governing drainage districts, and in Alberta and Saskatchewan also from proceedings under the Private Ditches Acts. Drainage districts have been dealt with elsewhere.[8] In the following will be given a survey of the Private Ditches Acts, R.S.A. 1955, c. 241, and R.S.S. 1953, c. 315. The Acts apply to ditches the estimated costs of which do not exceed $5,000 in Saskatchewan and $20,000 in Alberta, s. 4; Saskatchewan, s. 3(2).

A landowner who requires the construction of such a ditch shall proceed by attempting to obtain an agreement with the owners or occupants of other lands to be affected as to the site of the ditch and apportionment of work and material for construction and maintenance of the ditch.[9] If an agreement is arrived at, it shall be reduced to writing, signed by all the owners and filed with the secretary of the municipality or municipalities within which the lands affected are situated. An agreement made pursuant to the statutes has the same effect as an award (ss. 6, 7).

If no agreement is reached the owner may file a requisition with the secretary of the municipality for the appointment of an engineer to examine the question (ss. 11, 12). The engineer appointed by the municipality examines the locality and hears evidence as to the proposed construction of the ditch. The power to decide whether or not the ditch is to be constructed is in Alberta vested in the board of assessors, in Saskatchewan in the engineer. The Alberta board of assessors is composed of the engineer as chairman and two landowners elected by a majority vote of the owners of land to be affected present at the first meeting of owners called by the engineer. An award is made if "the ditch is required." No standard is stipulated as to when a ditch is to be considered required, which is within the discretion of the deciding authority. Thus, it is not required that a majority of the landowners are in favor of the constructon of the ditch although this is an element which properly may be taken into account. The main consideration must probably be whether the total estimated benefits of the ditch exceeds the total estimated costs of construction and maintenance.

If construction of the ditch is authorized, a written award is made specifying clearly the location, description and course of the ditch, its commencement and termination. The construction work is ordinarily done by the respective owners themselves and the materials and work are apportioned among the owners of lands affected according to the estimated direct benefits to the lands from the ditch. These estimated benefits afford also the measure for the apportionment of the maintenance of the ditch. Each owner shall as far as practicable maintain the portion within his own land (ss. 15, 16).

Where the deciding authority is of opinion that an owner of land will not be "sufficiently affected" by the construction of the ditch to make him liable to perform any part thereof, he may be relieved from this duty. A landowner must probably be considered not sufficiently affected where the estimated benefit to his land is less than or equals the damage to his land caused by the construction of the ditch. Reasonable damages are to be awarded by the deciding authority (ss. 16, 17).

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[7] Assiniboia R.M. v. Montgomery, (1930) 1 W.W.R. 500. Oral consent to the construction of a ditch coupled with expenditure of money in its construction held to give the plaintiff an equitable easement.

[8] See Chapter 17.

[9] In the case of Villeneuve v. Kelvington, R.M. (1929) 1 W.W.R. 186 the provisions of the Private Ditches Act, R.S.S. 1920, c. 162, s. 6, were interpreted as conditions precedent to proceedings under the Act, and non-compliance with the provisions were held to invalidate an award and subsequent municipal tax levy.

A time limit for the performance of the construction is to be stipulated in the award. If the work has not been completed within the expiration of the time limit the engineer is authorized to let the work to a contractor and charge the cost against the owner in default. Where the engineer is satisfied of the good faith of the defaulting owner he may in his discretion extend the time for performance.

An owner party to an award is entitled to have the award reconsidered at any time after the expiration of two years from the completion of the construction. For covered drains the time limit is one year, ss. 36, 38.

Every ditch constructed under the Private Ditches Acts shall be continued to a sufficient outlet. "Sufficient outlet means the safe discharge of water at a point where it will do no injury to lands or roads (or into a natural watercourse that will carry the discharge)." (Alberta, ss. 3, 2(f); Saskatchewan, ss. 3, 2(15).[10]

III. Removal of Obstructions to Drainage

(i) In the case of Farnell v. Parks (1917) 3 W.W.R. 882, the court of appeal of Alberta held that the right to natural drainage of surface water included the right to remove an adventitious obstruction and bring the land back to its natural condition with a possible exception where another person by reason of delay had been led to rely on the continuance of the obstruction and to deal with his land in such a way that he would be injured by the removal of the obstruction. The plaintiff had made a cut in a beaver dam within the defendant's land which obstructed the natural run-off of surface water. The defendant who filled in the cut with the result that the plaintiff's land became flooded was held liable in damages and enjoined from obstructing the ditch.

(ii) In the Case of Parry v. Reid (1920) 2 W.W.R. 45, the court of appeal of Saskatchewan held the same principle applicable to drainage through a natural watercourse.

(iii) Where works have been constructed obstructing the flow of water and by its removal more damage is caused than would have been the case if the obstruction never had made the person removing the obstruction will be liable for the additional damage: Baker v. Daly, (1926) 1 W.W.R. 71.

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[10] Larsen v. Hay Lake Drainage District, (1925) 1 W.W.R. 1066. Liability for drainage caused by flooding where works not continued to sufficient outlet.

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CHAPTER 12

Pollution

I. Deposit of Pollutive Material on Land

By pollution is meant the introduction of liquid or stable material into water whereby the natural quality of the water is changed.

Such pollutive material may be carried into the water by natural forces, as where it is drained off the land by rain water. Cultivation and use of land often necessitates deposits of pollutive material on the land. People "are not bound to abstain from a normal use of their ground merely in order that it may remain as clean a catchment area for the rainfall as it was in its virgin state": Stollmeyer v. Trinidad Lake Petroleum Co. (1918) A.C. 485. What amounts to normal use must vary with the circumstances. In the Stollmeyer case works causing oil to rise to the surface, which polluted the water of a river when washed off the land by rain water, was said to be a normal use of land since the tract of land in question was of great value as a petroleum area and of little value in any other connection.

Without special authority, pollution of water incidental to natural drainage of pollutive deposits on the land cannot be aggravated by artificial drainage or sewage works constructed or maintained for the purpose of carrying the deposits off the land. Pollution which may be caused by the combined effect of natural use of land and natural drainage is negligible as compared with the accumulation of pollution which may take place where such drainage or sewage works have been constructed. A different rule would also make the rules against pollution of water ineffective since people might construct drainage works, deposit pollutive material on the banks of the drains and leave it to the rain water to carry the material into the drains. In the case of Groat v. City of Edmonton (1928) S.C.R. 522, the water of a stream had been polluted by dirt from the streets being discharged into the stream through the sewers of the city. On behalf of the city it was argued *inter alia* that construction of streets and deposits of dirt in the streets was a natural use of the city ground, and that dirt carried into the drains by rain water or other forces of nature was permissible as distinguished from dirt carried into the drains by flushing of the streets. This argument was rejected. Duff, C.J.S.C. with whom Lamont, J.S.C. concurred, said (at p. 527): "If rain sweeps dirt off the streets and this is carried by gravity or other natural sources to a stream, the riparian owner has no right, but the city is not entitled to collect and discharge the filth of the streets through an artificial channel into a water course." Rinfret and Anglin, J.S.C. reached the same result (at p. 532) by holding that the right to drain does not include the right to pollute.

The right to deposit pollutive material on the land in its ordinary use is limited in two respects. In Saskatchewan certain types of pollutive material must not be deposited along the bank of a running stream, which includes all lands within fifty feet of ordinary high water mark, the Pollution of Streams Act, R.S.S. 1953, c. 319, ss. 2, 3. In Manitoba certain types of pollutive material must not be deposited within two chains of the normal high water mark of any body of water, the Pollution of Waters Prevention Act, R.S.M. 1954, c. 201,

s. 3. In Alberta the power to make regulations preventing pollution is vested in the provincial board of health and prohibitions similar to those in Saskatchewan and Manitoba will depend upon the rules and regulations in force at any given point of time.[1]

In all three provinces there is the additional limitation that pollutive material must not be accumulated on the land in such a way as to constitute a nuisance.

II. Relative Prohibition Against Pollution of Water

Apart from pollution permissible under the rules above, any introduction of foreign matter into water which sensibly affects the quality of the water is unlawful. Thus in the case of John Young & Co. v. Bankier Distillery Co. (1893) A.C. 691, the appellants pumped water from their coal mines which they discharged into a burn. The respondents operated a distillery lower down on the same burn and used for its production water from the burn. The water discharged into the burn was pure but hard in quality and the volume added was sufficient to make the water of the burn, as it passed the respondents' land, hard instead of soft. The water so produced was much less suitable for distilling than the natural soft water of the burn. The respondents were held not entitled to discharge the hard water into the burn. The majority of the House of Lords reached the result by applying the rule that the lower owner is entitled to the flow of water unincreased in quantity. But the increased quantity did not by itself constitute a cause of complaint. The case was therefore in reality one of pollution.

When the quality of water can be said to be sensibly affected is a relative concept depending primarily upon the magnitude of the water and its existing and potential uses.

III. Absolute Prohibition Against Pollution of Water

Certain types of pollution are absolutely prohibited in this sense that it is immaterial whether or not the quality of the water is sensibly affected. Saskatchewan provides that "a person who deposits or causes or allows to be deposited along the bank of a running stream in Saskatchewan, or who casts or throws into its waters stable manure or night soil, carcasses, sawdust, salt water, any matter of form of industrial waste or other filthy or impure matter is guilty of an offence."[2] Manitoba provides that "no person shall leave, deposit or throw, or permit or cause to be left, deposited or thrown any manure, night soil, decayed or decaying matter, the carcass or offal of any animal or fish or part thereof, lime, chemical substances, drugs, poisonous matter, garbage, refuse, cans, bottles, rubbish or any other filthy or impure matter of whatsoever kind, within two chains of the normal high water mark of any body of water or into the waters of, or upon the ice of, any body of water.[3] Alberta authorizes the provincial board of health to make rules and regulations in respect of "the prevention of the pollution, defilement, discoloration or fouling of all lakes, streams, pools, springs or waters, and the insuring of their sanitary condition..." and also for "the prevention of the pollution of soil or water by human excreta or otherwise."[4,5]

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[1] R.S.A. 1955, c. 255, s. 7(i)(t), (ff).

[2] R.S.S. 1953, c. 319, s. 2(1).

[3] R.S.M. 1954, c. 201. s. 3.

[4] R.S.A. 1955, c. 255, s. 7(1)(i), (ff).

[5] Prohibitions against pollution of navigable water are provided for by the Navigable Waters Protection Act, R.S.C. 1952, c. 193, ss. 18, 19, 20.

In the case of Airdrie Magistrates v. Lanark County Council (1910) A.C. 286 the appellants who had discharged sewage into certain burns contrary to provisions prohibiting such pollution of streams sought to set up the defence that the burns had already been polluted to such an extent that they could not be characterized as streams. This was rejected, Lord Loreburn saying (at p. 291): "But what the appellants say is this: Permit us to prove that these burns are sewers, and if we can prove that they are sewers, surely it cannot be an offence to pour sewage matter into the sewers. My Lords, that is merely asking leave to prove that they have with or without the contribution of others committed in an aggravated degree the very offence with which they are charged. The object of the Act is to prevent streams being turned into sewers, and this is what they propose to do and have done." Similarly, it was decided in the case of George Legge & Sons, Ltd. v. Wenlock Corporation (1938) A.C. 204 that where a natural stream has as a matter of fact been turned into a sewer by discharge of sewage into the stream and the quality of the water already has been destroyed this fact is immaterial for the purpose of deciding the legality of the discharge.

The case of Butterworth v. West Riding of Yorkshire (1909) A.C. 45 decided that absolute statutory prohibitions against pollution are mandatory and not directory only. They are passed in the public interest and cannot be waived. Consequently a right to pollute contrary to these provisions cannot be acquired by agreement or by use. Such a right to pollute can only be acquired under statutory authority.

IV. Exceptions from Prohibitions against Pollution

It will be seen that introduction of foreign matter into a stream which sensibly affects the quality of the water as it flows past the land of some other person may or may not be in violation of the absolute prohibitions against pollution. Thus discharge of hard but pure water would not be within the prohibitions unless it is covered by the term industrial waste. The right to prevent such pollution as does not fall within the absolute prohibitions is considered an incident of property. It may therefore be waived, acquired by agreement, or use to the extent use is generally recognized as the foundation of a legal right in Alberta, Saskatchewan and Manitoba. An agreement to pollute in violation of the absolute prohibitions is valid as between the parties if it is entered into with a view to obtaining permission to pollute from the proper officials under the statutory exceptions. In the case of B.C. Forest Products Ltd. v. Nordal and Nordal (1954) 11 W.W.R. (N.S.) 403 an agreement in support of an application for such permission which gave the plaintiff a right to pollute was rectified so as to make it conform with the requirements of an easement registrable as a burden against the land of the defendant.

Modern society cannot exist without at times polluting water. Municipalities require organized systems of sewerage. Operation of industries necessitates discharge of industrial waste. In either case water may be the only possible outlet. Exceptions are therefore made from the general prohibitions against pollution, making it possible upon application to the proper officials to obtain permission to discharge the pollutive material into water. The purpose of this administrative control is to assure the highest practicable purification and discharge at a point where the least possible harm will result.

In Alberta the general control is vested in the provincial board of health and discharge of pollutive material generally prohibited by regulations can only be made where exceptions are made for such discharge by or under authority of the regulations. Construction of a sewerage project shall not be commenced by any person until certified by the chairman of the board.[6]

In Saskatchewan the general prohibition against pollution mentioned under III above does not apply to industrial waste where written consent of the Minister of Natural Resources has first been obtained. Nor does it apply to the discharge of sewer waters from any pipe or drain leading from a dwelling house, hotel or public institutions. But no common sewer, system of public sewerage or sewage treatment shall be constructed without the approval of the Minister of Public Health.[7] In Manitoba, the general control of pollution of water is vested in the provincial sanitary control commission which "may grant licenses, subject to such conditions and restrictions as it may prescribe, authorizing the discharging or draining of sewage or waste into any body of water..."[8, 9]

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[6] R.S.A. 1955, c. 255, ss. 11-23.
[7] R.S.S. 1953, c. 319, ss. 2(2), 4; R.S.S. 1953, c. 230, s. 25.
[8] R.S.M. 1954, c. 201, s. 15.
[9] For navigable waters see Navigable Waters Protection Act, R.S.C. 1952, c. 193, ss. 22, 24, 25.

CHAPTER 13

Fishing Rights

I. Constitutional Questions

(i) By the B.N.A. Act, 1867, s. 91(12) the legislative power over "Sea Coast and Inland Fisheries" is given to the federal parliament, whereas by s. 92(13) of the same Act the provincial legislatures are given legislative power over "Property and Civil Rights in the Province."

A distinction must be drawn between legislation dealing with the rights of the subjects to fish and legislation dealing with administrative control of the exercise of those rights.

The fishing rights fall in two groups, public and private rights. Public rights of fishing are not considered as proprietary rights or rights incidental to property. For this reason no power over public rights of fishing is vested in the provincial legislatures by s. 92(13) of the B.N.A. Act. A public right to fish can be taken away only by authority of parliament and "all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only." [1]

(ii) Legislative power over private rights of fishing is vested in the legislatures, provided it does not infringe on the power of parliament to control the exercise of those rights. Legislation changing the basis of private fishing rights from ownership of the bed to ownership of the bank of water would be within the powers of the provincial legislatures. So would legislation "prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it" as well as "the terms and conditions upon which the fisheries which are the property of the province may be granted, leased or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein."

(iii) Title to private (or exclusive) rights of fishing was not affected by s. 91(12) of the B.N.A. Act: The Queen v. Robertson (1882) 6 S.C.R. 52 at 121, where a lease by the federal government of the right to fish in a river owned by a province and its grantees prior to confederation was declared void.

(iv) The power to legislate concerning administrative control of the exercise of fishing rights as distinguished from the rights themselves is given to parliament. The distinction may sometimes be difficult to draw since "the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose... might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature." [2]

[1] A.-G. for Canada v. A.-G. for Ontario, Quebec and Nova Scotia, (1898) A.C. 700 at 716, cpr. A.-G. for B.C. v. A.-G. for Canada, (1914) A.C. 153 at 172-173.

[2] A.-G. for Canada v. A.-G. for Ontario, Quebec and Nova Scotia (1898) A.C. 700 at 713.

(v) The limits of parliament's power to control the mode and manner of fishing was the subject matter of litigation in the cases of Rex v. Wagner, (1932) 2 W.W.R. 162 and Rex v. Tomasson (1932) 2 W.W.R. 176. Legislation prohibiting possession of fish during closed seasons was held necessary for the enforcement of prohibitions against fishing during those seasons and as such within the powers of parliament and exclude from the powers of the provincial legislatures.

(vi) In the case of A.-G. for Canada v. A.-G. for British Columbia, (1930) A.C. 111, parliament's power under the "sea coast and inland fisheries" clause was held not to extend to licensing of fish canneries for the purpose of controlling the curing and marketing of fish. The right to fish was regarded as exhausted when the fish had been taken out of the water, and curing and marketing were considered as incidents of property in the fish when caught. Licensing of the fish canneries was not necessarily incidental to control of the mode and manner of fishing.[3]

(vii) The so-called clear field theory does not apply to the division of power here in question. The provincial legislatures are excluded from legislating in relation to control of the mode and manner of fishing [4] or public rights of fishing [5] even though no conflicting federal legislation might exist.

II. Public Right of Fishing

A fishery is the right to catch fish at a certain place or from particular waters. The right may be either public or private (exclusive). The public has a right to fish in tidal waters.

Exceptions existed at common law where an exclusive right of fishing in tidal waters was found or presumed to originate before Magna Charta, but these exceptions are not applicable to Canada. No exclusive right of fishing in tidal waters can be created by Royal grant. The public right of fishing in such waters can only be taken away by competent legislation, i.e., by legislation of the federal parliament: A.-G. for B.C. v. A.-G. for Canada, (1914) A.C. 153 at 169-170.

In the cases of the Queen v. Robertson (1882), 6 S.C.R. 52 at 132 and Re Provincial Fisheries (1896) 26 S.C.R. 444 at 520, Strong, C.J. held that the public right of fishing on this continent extends to the large navigable fresh water rivers above the flow of the tide, where the title to the bed of those rivers has been reserved by the Crown. This is opposed to a statement by the Privy Council in the above mentioned case from British Columbia ((1914) A.C. 153 at 173): "The fishing in navigable non-tidal waters is the subject of property, and according to English law must have an owner and cannot be vested in the public generally."

III. Private Right of Fishing

(i) By private (or exclusive) right of fishing is meant the right to catch fish at a certain place or from particular waters to the exclusion of all other persons, which attaches to owners of certain lands and their successors in title.

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[3] Cpr. R. v. Sommerville Cannery Co., (1927) 3 W.W.R. 215.

[4] A.-G. for Canada v. A.-G. for Ontario, Quebec and Nova Scotia, (1898) A.C. 700 at 714-715.

[5] A.-G. for B.C. v. A.-G. for Canada, (1914) A.C. 153 at 172, cpr. A.-G. for Canada v. A-G. for Quebec, (1921) 1 A.C. 413.

(ii) Ownership to the bed of the water has been considered as the basis of the private right of fishing: McKie v. The K.V.P. Co., (1948) 3 D.L.R. 201, 214 where McRuer, C.J. stated that "the general principle is that rights of fishing are in their nature mere profits of the soil over which the water flows and the title thereto arises from the right to the solum." [7] There is, on the other hand, a statement by Fisher, J., in the case of Steadman v. Robertson, 18 N.B.R., vol. II, 580 at 589, to the effect that the private right of fishing depends on ownership of the bank, not of the bed of the water in the same way as any other riparian right.[8] At common law ownership to the bed was presumed from ownership of land bordering on water. It was then of little significance to distinguish between ownership of the bank or the bed as the basis of the right of fishing. Fishing was one of the main purposes for which beds of rivers and lakes could be used. Therefore, where a fishery was established ownership to the bed was presumed. Likewise, when land bordering on water had been granted and the bed of the water reserved the reservation was held to imply a reservation of the fishery. In Alberta, Saskatchewan and Manitoba legislation has been introduced reserving to the provinces the title to the bed where land bordering on water is granted by the Crown. Whether this reservation, introduced to achieve the most beneficial use of water, also implies a reservation of the fishing rights still remains to be decided.

(iii) The private right of fishing can be severed from the land to which it ordinarily attaches by agreement. With regard to use as basis for acquisition of fishing rights, see chapter 5 above.

(iv) A private right of fishing cannot co-exist with a public right of fishing, i.e., it cannot exist in tidal waters and possibly not in the large navigable fresh water rivers, except by authority of federal legislation.

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[7] The decision was, in the main, upheld on appeal by the court of appeal of Ontario, (1949) 1 D.L.R. 39 and the Supreme Court of Canada, (1949) 4 D.L.R. 497, but without discussion of the point in question against which no appeal was brought. Cpr. also A.-G. for B.C. v. A.-G. for Canada, (1914) A.C. 153 at 167 and the Queen v. Robertson, (1882) 6 S.C.R. 52.

[8] The case has been approved by the Supreme Court of Canada but without reference to this particular question: The Queen v. Robertson, (1882) 6 S.C.R. 52 at 125.

CHAPTER 14

Underground Water

I. Distinction between Underground Water forming Part of Stream and Underground Percolating Water

A distinction must be drawn between underground water forming part of a stream and flowing in a defined channel, and underground percolating water. The former follows the same rules as superficial water.[1]

II. Principles upon Which Rules are Based

It is desirable that percolating underground water should be utilized as a source of water supply and this object might be defeated if the rules of law governing superficial water were held to apply. The mere fact that water is percolating underground in undefined channels makes it impossible for a landowner to know beforehand whether a well sunk in the ground would in some way injuriously affect the land of a neighbor. Nor can he know the geographic extent of possible injurious effects. Every well sunk might therefore represent a potential law-suit.

The same uncertainty concerning the effect on percolating water is also present in connection with drainage works and other uses to which land is ordinarily put.

The facts of a legal dispute would mainly depend upon conflicting expert opinions.

Underground water is considered by water supply experts to contain reservoirs of great potentialities for municipal and industrial use. Effective utilization of these reservoirs may necessitate legislation which should be preceded by a technical survey of the geographic extent of the reservoirs to which the legislation may be limited. Such legislation ought to contain provisions preserving the right to dig ordinary wells and other uses considered as good husbandry of land. It is also desirable that a special board should be established to handle possible disputes. The board ought to include experts specially qualified to decide factual issues likely to arise.

III. The Leading Case of Chasemore v. Richards Holding Law of Superficial Water Inapplicable

In Chasemore v. Richards, (1859) 7 H.L.C. 140 a local board of health had sunk a well on its own land for the purpose of supplying a town with water. The well was situated a quarter of a mile from a river and underground percolating water which otherwise would have found its way to the river was abstracted in such quantities to be of sensible value towards the working of the plaintiff's mill situated on the river. The House of Lords held the landowner entitled to avail himself of such underground water for purposes not connected with the enjoyment of the land, deciding that the law governing superficial water did not apply.

[1] Chasemore v. Richards, (1859) 7 H.L.C. 140 at 150.

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IV. Limitation on Right to Use Underground Water Supply Use Improperly or Maliciouly Motivated

In Mayor of Bradford v. Pickles, (1895) A.C. 587, the town of Bradford had erected waterworks on its own lands from which the town was supplied with water. The special statute authorizing the erection of the waterworks contained no provision for compensating the owners of the neighboring properties in the event of land held by them being prejudicially affected by the undertaking. The respondent began to sink a shaft which, if persevered in, would have resulted in a considerable and permanent diversion of the water percolating underground through his land. His motive was to prevent the town from using the water percolating through his land for commercial purposes without compensation. The House of Lords held that this motive did not render his acts unlawful.

There are strong dicta in the case to the effect that no motive, however improper or malicious, would render the use of percolating water illegal.[2] These opinions are not necessary for the result. It is settled law that works authorized under special statutes cannot be erected in such a way as to injuriously affect neighboring land without compensation unless expressly so authorized. The respondent would have been entitled to prevent the utilization by the town without compensation of a superficial water supply on his land and it is sufficient for the decision that he has the same legal protection against utilization without compensation of a water supply percolating underground.

The question whether a landowner's right to utilize percolating underground water is limited to such use as is not improperly or maliciously motivated, is therefore still open. The scarcity of water and its importance in the prairie economy are circumstances which would tend to make the above-mentioned dicta inapplicable in Alberta, Saskatchewan and Manitoba. They are contrary to the principle of most beneficial use which underlies some of the most important rules governing water in the three provinces. It is therefore possible that the right to use percolating underground water is limited to such use as is not motivated by a desire to prevent the neighbor from using water resources for purposes connected with the enjoyment of his land.

V. Right to Use Percolating Underground Water Qualified by Rules of Drainage and Pollution

A landowner's right to use percolating underground water is qualified by the rules of drainage and pollution. Thus in the case of Christa v. Marshall, (1945) 2 W.W.R. 44 a landowner who permitted surplus water to escape from an artesian well thereby increasing the natural drainage off the land was held liable in damages to the lower proprietor.

VI. Mode of Utilization Controlled by Rules of Negligence, Nuisance and Strict Liability

The rules of negligence, nuisance and strict liability apply as well to percolating underground water as to superficial water protecting the landowner's right[3] and qualifying the mode and manner of its utilization.

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[2] See Lord Halsbury, L.C. at p. 594 of the report; Lord Watson at p. 598; and Lord Macnaghten at p. 601.

[3] Leibel v. South Qu'Appelle R.M., (1943) 3 W.W.R. 566; (1943) 2 W.W.R. 277. An artesian well had been contaminated by seepage of poisonous matter from a building operated by a Municipality. The Municipality was held liable in damages to a person who had received physical injuries by drinking water from the well.

VII. Administrative Control

Legislation introducing some public control of underground water supply has been passed in all the three provinces but was repealed in Saskatchewan.[4] The Alberta and Manitoba statues are the Ground Water Control Act, R.S.A. 1955, c. 135 and the Well Drilling Act, R.S.M. 1954, c. 290, respectively.

(i) *Alberta*—Permit for boring from the Director of Water Resources is required to commence a well. But this does not apply to a person boring on lands of which he is the owner, s. 4. "Owner" includes a person who is in possession of or has the right to the immediate possession of land as a lessee, sub-lessee or purchaser under an agreement for sale or as a licensee, s. 2(g).

S. 10 gives *inter alia* the Lieutenant Governor in Council power to make regulations "respecting the control and utilization of the flow of water from a well or other source of ground water." It appears from the Act that its object is not to change the ownership to this source of water supply, but to facilitate its conservation, development and control. Regulations prohibiting waste would therefore be within the provision, but not regulations prescribing utilization for other purposes than those of the owner.

Regulations may also be made for the construction and management of wells, and the Director of Water Resources may make any test or examination he desires and collect geological and other information (ss. 10, 5).

(ii) *Manitoba*—As in Alberta, a permit is required for boring of wells. But "well" does not include a well dug or bored from which is obtained or for the purpose of obtaining water for domestic purposes on agricultural land, s. 2(g).

A certain power to make regulations concerning construction, management and control of ground water supply is introduced. But such regulations would by way of definition be excluded from application to the above-mentioned agricultural wells.

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[4] Well Drillers Act, R.S.S. 1953, c. 328, repealed S.S. 1954, c. 84, s. 1.

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CHAPTER 15

Liability for Damages Caused by Water Works

I. Introduction

A person is not entitled to invade another person's water rights, as outlined above, and if he does he may be restrained by an injunction and held liable in damages.

But use of water which in itself is legal will in certain circumstances give rise to liability for damages where the water right is utilized in a mode and manner likely to cause injury to another's person or property and such injury is actually caused.

II. Strict Liability

(i) By strict liability is meant liability without fault. The leading case, after which the rule is usually named, is Rylands v. Fletcher (1868) L.R. 3 H.L. 330. A millowner had built a reservoir for storage of water. When filled, a number of old shafts in the bed of the reservoir broke, and a colliery belonging to the plaintiff was flooded. The plaintiff was held entitled to recover damages although no negligence was charged against the defendants personally. The rule is stated to be that "the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." Lord Cairns, in the House of Lords, qualified the rule by drawing a distinction between natural and non-natural user of land. Only in the latter case would strict liability result.

(ii) From the rule of strict liability there is a number of exceptions. Consent by the plaintiff, or damage caused by the plaintiff's own fault, by the act of a stranger, or for the common interest takes the situation out of the strict liability rule. Another exception, often argued but seldom applied in connection with waterworks, is vis major or the act of God. In the case of Nichols v. Marshland (1875) L.R. 10 Ex. 255 the embankments of three ornamental pools burst as a result of a sudden thunderstorm and unprecedented heavy rainfall and the water thus let loose destroyed a certain number of bridges lower down on the watercourse. The court held that the defendant was not liable as the storm was of such violence that it amounted to vis major. No single legal test exists for what amounts to vis major. In the case of Greenock Corporation v. Caledonian Rly. (1917) A.C. 556, 572 Lord Finlay stated it to be "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore, are calamities which do not involve the obligation of paying for the consequences that may result from them." Vis major is a relative concept. It depends upon the nature of the human act in question whether it can be foreseen that the consequences of possible natural accidents will be aggravated by the act. In relation to construction of dams and diversion of water floods of extraordinary violence must be anticipated as likely to take place from time to time. And, apart from Nichols v. Marshland, the courts have consistently held that persons whose acts are directed towards controlling

the forces of nature cannot be heard by the defence that the natural forces were stronger than anticipated.[1] A distinction was previously drawn between storage of water and diversion of the course of a natural stream. The former was a legal use, the latter illegal. For this reason a higher degree of liability was said to exist in the latter case than in the former. There is today little room for this distinction in Alberta, Saskatchewan and Manitoba. Authority from the proper administrative officer or board is required for either type of use and the use is legal when authorized. To the extent vis major is a defence in "storage cases" it must therefore also be a defence in "diversion cases." The distinction must be between authorized and unauthorized uses.

(iii) Statutory authority for construction of works was originally considered as having the effect of removing the operation of the strict liability rule. Thus in the case of Geddis v. Proprietors of Bann Reservoir (1878), 3 App. Cas. 430, 455 Lord Blackburn said: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone..." But this viewpoint has been modified. In the case of Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd. (1936) A.C. 108 Lord Wright said: "Where undertakers are acting under statutory powers it is a question of construction, depending on the language of the statute, whether they are only liable for negligence or whether they remain subject to the strict and unqualified rule of Rylands v. Fletcher." Apart from a few for practical reasons unimportant exceptions, statutory authorization is today required in Alberta, Saskatchewan and Manitoba for the construction of any type of waterwork which may represent a potential danger. It depends accordingly upon an interpretation of these statutes whether strict liability applies to such works or is limited to those instances where works have been constructed without authority or in violation of authority given.

(a) *Alberta.*—The Water Resources Act, R.S.A. 1942, c. 65, s. 37 provided: "In case any works have been constructed or are maintained and operated pursuant to any provisions of the Prairie Farm Rehabilitation Act, of the Statutes of Canada, and of this Act, or either of them, upon any land other than works constructed, maintained or operated by the registered owner of that land whereby any water is accumulated, stored or conveyed on or over such land, neither the registered owner of the land nor any person claiming by, through or under him shall be under any liability in respect of damage done by water arising from the accumulation, storage or conveyance thereof by reason of any act or default on the part of any person other than the registered owner and persons as aforesaid and their respective agents and servants." This provision needs some explanation. Under the Water Resources Act and the Acts above mentioned a person may by administrative decision or expropriation acquire the right to construct Waterworks upon land belonging to some other person. This is the situation provided for, cpr. the words: "In case any works have been constructed or are maintained or operated... upon any land *other than* works constructed, maintained and operated by the registered owner of that land." The section then goes on to relieve the registered owner (or persons claiming under him) from liability for damage done by the water except where the damage is attributable to an act or default by the owner himself or his agents and servants. Since liability in negligence or nuisance always must be attributable to an act or default by the defendant, his agent

[1] See for instance, the Greenock Corporation case; Southern Canada Power Co. v. The King (1936) S.C.R. 4; Montreal Light, Heat & Power Co. v. A.-G. of Quebec (1909) 41 S.C.R. 116; Fletcher v. Smith (1876-77) 2 A.C. 781; Kelly v. C.N.R., (1950) 1 W.W.R. 744; Low v. C.P.R., (1949) 2 W.W.R. 433

or servants, these types of liability remain unaffected by the provision. This limits the scope of relief from liability to the strict liability under Rylands v. Fletcher. The general common law rule is that a landowner is liable also where he has permitted the creation of the potential danger on his land by some other person. The effect of s. 37 is to relieve the landowner of strict liability where waterworks have been constructed on his land on behalf of another person, provided the construction is authorized by the administrative officials under the statutes in question. This provision would have been unnecessary if the intention of the legislature were that statutory authority for the construction of waterworks should by itself work a general removal of the strict liability rule. The introduction of a limitation assumes the continued existence of the strict liability rule in a limited form s. 37 of R.S.A. 1942, c. 65 is now replaced by s. 43 of R.S.A. 1955, c. 362, which, although slightly differently worded, must be given the same interpretation.

(b) *Saskatchewan.*—The Water Rights Act, R.S.S. 1953, c. 48, s. 66 provides: "The owner of land, whether registered as such or not, upon which works have been constructed or maintained, or constructed and maintained, or through or over or upon which water has been conducted, stored or accumulated under and by virtue of this Act and the Prairie Farm Rehabilitation Act (Canada) or either of the said Acts, shall not, unless through his own action or the action of his servant or agent damage is done by such water, be liable in damages or otherwise to any person by reason of the construction, maintenance, operation, lack of or negligence in maintenance or operation, or existence of such works or by reason of the passing, flowing, storing or accumulating of such water through or over or upon such land, except in the case of works constructed or maintained, or constructed and maintained, or water conducted, stored or accumulated, by such owner himself." This section will be found to contain similar provisions as s. 37 of the Alberta Act. The same reasoning therefore applies to its interpretation.

(c) *Manitoba.*—The Water Rights Act, R.S.M. 1954, c. 289, s. 29(2) provides: "All the provisions of the Expropriation Act that are applicable apply to fixing the amount of, and the payment of compensation for, damages to lands arising out of the construction or maintenance of the works of the applicant or out of the exercise of any of the powers granted to him under this Act." The words used are wide enough to embrace strict liability. Since waterworks require authorization under the Act, damages caused by waterworks are damages arising out of the exercise of powers granted. S. 29(1) deals with acquisition by expropriation of interests, rights or privileges with regard to land, and ss. (2) is not limited to damages connected with expropriation unless such a limitation can be said to follow from the context in which the subsection is placed. In the case of Southern Canada Power Co. v. The King (1936) S.C.R. 4 the Supreme Court of Canada interpreted the Quebec Water Courses Act, s. 12 which provided: "The owner or lessee of any such work shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise." Two dams had been constructed under statutory powers impounding vast masses of water. A tremendous overflow of water and ice washed out a railway embankment. The power company sought to argue the ejusdem generis rule, that strict liability only attached to excessive elevation or similar acts, but this argument was rejected by the Supreme Court holding the rule in Rylands v. Fletcher applicable. It will be seen that the Manitoba rule is different from the Quebec rule in this respect that it is in form procedural only. It enacts a certain procedure

for fixing the amount of compensation, while assuming the existence of liability for damages. But the words describing this assumed liability are as wide as the words enacting liability in Quebec.[2]

(iv) Liability attaches to the person who owns or controls the waterworks, as well as the landowner who has permitted their construction on his land. As already mentioned, where works are constructed under the Water Resources or Water Rights Acts of Alberta and Saskatchewan the liability is limited to the persons who construct, maintain or operate the works.

A special situation may arise where a person comes into possession of land on which a dangerous accumulation of water has already been created by the construction of waterworks. The similarity between strict liability and liability for nuisance is mentioned in a number of cases. It is settled law that an occupier of land who has not himself created a nuisance is not liable unless he continues or adopts the nuisance. Continuation or adoption of waterworks may be a condition also for strict liability. The difference in the position of a person who has himself created a dangerous accumulation of water as compared with one who comes into possession of the land after the danger has been created is recognized in Nichols v. Marshland as distinguishing the case from Rylands v. Fletcher.[3]

(v) The liability under Rylands v. Fletcher extends to damage to land, but there is difference of judicial opinion as to whether the strict liability also extends to damage to chattel and personal injuries.[4] In Saskatchewan s. 24 of the Conservation and Development Act, R.S.S. 1953, c. 203, limits the liability of the authority of a conservation and development area for damage caused by the works in the area to loss on account of the surface of farming land being detrimentally affected for agricultural purposes. This limitation applies whether the claim is based on strict liability, nuisance or negligence.

III. Nuisance

(i) The question of liability for nuisance is—as far as water is concerned—practical in connection with drains and ditches, where water cannot be said to have been collected in such a way as to be "likely to do mischief if it escapes," and where the rule in Rylands v. Fletcher accordingly does not apply. No rule as to what constitutes a nuisance both general and of practical guidance appears to exist. In the case of Sedleigh-Denfield v. O'Callaghan (1940) A.C. 880 Lord Wright said (at p. 903): "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbor not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society." In the case a pipe had been placed in the continuance of a ditch on the defendant's property. To prevent the possibility of wood or leaves blocking the opening of the pipe, which under the circumstances was likely to occur, it would have been proper practice to fix a grating in the ditch a little way from the opening of the pipe. The grating

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[2] The effect on the strict liability rule of special statutory authority for construction of works impounding water by railways has been dealt with in Kelly v C.N.R., (1950) 1 W.W.R. 744 and Low v. C.P.R., (1949) 2 W.W.R. 433.

[3] (1875) L.R. 10 Ex. 255 at 258 where Cleasly, B. remarked: "There (in Rylands v. Fletcher) the defendant brought the water on to his own land. Not so here."

[4] In Southern Canada Power Co. v. The King the majority of the judges in the Supreme Court of Canada were of opinion that liability goes beyond damage to property.

was instead placed on top of the opening itself, where it was useless. During a heavy storm the pipe was blocked with refuse and the plaintiff's premises were flooded by water coming down the ditch which could not get away down the pipe. This was held to constitute an actionable nuisance.

In the case of C.P.R. v. Parke (1899) A.C. 535 the respondents had diverted water for irrigation purposes. Irrigation was indispensably necessary in order to develop the fertility of the soil. Due to the nature of the soil a slide of land was formed by the percolating water seriously threatening the existence of the appellant's railway line. A considerable number of men and railway equipment had to be kept constantly at work to make the line fit for passage by the trains but without being able to remove the danger. The respondents were not negligent in their methods of irrigation. Nevertheless, an injunction was granted by the Privy Council restraining the respondents from so irrigating their land as to injure the railway line.

(ii) The question of who is responsible for a nuisance was the main issue in the case of Sedleigh-Denfield v. O'Callaghan where the nuisance had been created by a third party on the defendant's property without his consent or knowledge. In such a case it is a condition of the occupier's liability that he has adopted or continued the nuisance. He adopts the nuisance where he makes use of the erection, bank or artificial contrivance which constitutes the nuisance.[5] He maintains the nuisance if he, with knowledge or presumed knowledge of its existence, fails to take any reasonable means to bring it to an end though with ample time to do so.[6]

(iii) In the case of C.P.R. v. Parke the defence was raised that where an act had been done under statutory authority no action would lie for damages caused without negligence. The Privy Council held that this depends upon whether the statute is imperative or merely permissive, and that if no compensation has been stipulated by the statute for the damage "it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others." [7]

In the case of Corporation of Raleigh v. Williams (1893) A.C. 540, a statute provided that where a municipality undertaking municipal drainage neglected or refused upon reasonable notice to repair the drains it might be compellable upon mandamus to make the repairs and should be liable for damages by reason of the neglect or refusal. The Privy Council held that notice was a condition precedent to the bringing of a mandamus, but not to the right to recover damages.

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[5] In the case of Clare v. City of Edmonton (1913-14), V W.W.R. 1133 sewers causing pollution had been constructed by the City of Strathcona prior to its amalgamation with the City of Edmonton. The City of Edmonton was held liable as it continued the discharge from these sewers.

[6] Cpr., the case of Nichols v. Marshland where it is questionable whether "the nuisance", the construction of the dams in question, could have been abated by reasonable means. In the case of Woolard v. Corporation of Burnaby (1905), 2 W.L.R. 402, the majority of the court of Appeal of B.C. held that the defendant corporation could not physically abate the nuisance and that it had no duty to apply for an injunction against a third party.

[7] In the case of Manchester Corporation v. Farnworth (1930) A.C. 171, 183 Lord Dunedin stated the following test: "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that this result is inevitable is on those who wish to escape liability..." Cpr. the cases of Fraser and Fraser v. City of Vancouver (1942) 1 W.W.R. 608, Renahan v. City of Vancouver, (1930) 3 W.W.R. 166 and Topham v. City of Edmonton, (1932) 1 W.W.R. 636.

IV. Negligence

(i) Construction, maintenance and operation of waterworks are subject to the general law of liability for negligence. This liability is in theory founded upon a duty of care assumed to exist between the defendant and the plaintiff, and a subsequent breach of that duty by the defendant. Most waterworks require administrative consent under various statutes depending upon the nature of the works, and many of these statutes deal with the standard of care to be exercised by the applicant for the waterworks. It should therefore be mentioned that the question of negligence in relation to waterworks cannot be exhausted without inquiry into the statutes, under which the works have been constructed.

(ii) Where by the construction of waterworks a potential danger has been created which is materialized into actual danger, causing damage as a result of negligence, liability has been extended beyond the limits usually provided by the so-called rules of causation or remoteness. Thus, in the case of Manchester Corporation v. Markland (1936) A.C. 360 a service pipe belonging to a waterworks corporation burst and caused a pool of water to form in a road. Two days later a sudden and severe frost froze the pool. Three hours after a man descending from a streetcar was hit by an automobile skidding on the ice. There was no negligence on behalf of the driver of the automobile. The corporation did not know that the service pipe had burst until after the accident, but was found negligent in maintaining a defective system of inspection and held liable for the damages. It will be seen that two intervening "causes" had occurred between the negligence and the injury, namely, the severe frost and the skidding of the automobile. When liability nevertheless was imposed, this must probably be attributed to the cumulative effect of the creation of a potential danger and negligence in its control.[8]

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[8] The following is a list of cases dealing with negligence in relation to water works, mainly drainage and sewage works constructed or maintained by municipalities:

Kmetiuk v. Lac du Bonnet R. M. (1938) 1 W.W.R. 847
Graham v. St. Boniface, (1935) 1 W.W.R. 282
Maytag v. Hanover R.M., (1930) 3 W.W.R. 577
Pierce v. Winchester, R.M., (1930) 2 W.W.R. 752
McCarthy v. St. Boniface (1925) 2 W.W.R. 209; (1924) 2 W.W.R. 1196
Johnson v. Municipality of Lakeview (1924) 3 W.W.R. 505
Dunn v. St. Anne (1914) VI W.W.R. 1415
Statt v. North Norfolk R.M. (1914) 26 W.L.R. 774
Portage Fruit Co. v. City of Portage La Prairie (1913). 25 W.L.R.
Woodward v. City of Vancouver (1911-12), 1 W.W.R. 70
Rose v. Ochre River R.M. (1910), 15 W.L.R. 200
Baskerville v. Franklin R.M. (1906) 3 W.L.R. 547
Stadnick v. Mun. of Bifrost (1921), 3 W.W.R. 49
Meier v. Franklin R.M. (1927) 1 W.W.R. 753
Jukes v. Coldwell R.M. (1926) 3 W.W.R. 210
Pelletier v. Springfield R.M. (1924) 3 W.W.R. 786
Wilkinson v. St. Andrews R.M. (1923) 3 W.W.R. 961
Hooper v. North Vancouver (1921) 1 W.W.R. 878
Eakins v. Town of Shaunavon (1918) 1 W.W.R. 566
McCrimmon v. B.C. Electric Co. (1915), 32 W.L.R. 81; 29 W.L.R. 517
Clarke v. City of Edmonton (1933) 1 W.W.R. 113; 1928 1 W.W.R. 553
Frache v. Lethbridge (1954) W.W.R. 613 (N.S.) 609
Sterling Shoes Ltd. v. Calgary (1941) 1 W.W.R. 72
McDonald v. Winnipeg (1927) 3 W.W.R. 276
Davidson v. City of Lethbridge (1912), 21 W.L.R. 273
Brown v. City of Regina (1914-15) VII W.W.R. 228
Kozlowski v. C.P.R., (1947) 1 W.W.R. 769
Stewart v. Springfield & Tache R.M. (1928) 3 W.W.R. 198; (1927) 1 W.W.R. 417
Morrison v. Dewdney Dyking Dist. (1922) 3 W.W.R. 250
Elliott v. Glenmore Irrigation Dist. (1923) 3 W.W.R. 1384
Kenny v. St. Clements R.M. (1914), 26 W.L.R. 432; 21 W.L.R. 821
Radych v. Manitoba Power Commission (1943) 2 W.W.R. 143
Elite Cafe Ltd. v. City of Regina (1919) 2 W.W.R. 120
Oliver v. Francis (1919) 2 W.W.R. 497

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CHAPTER 16

Loss of Water Rights

I. Acquisition and Loss of Rights

Every acquisition of a water right represents a corresponding loss. For every purchaser who by his purchase acquires a right to make a particular use of water there is a vendor who loses the same right, and similarly for the other modes of acquisition. In the following will be dealt with certain situations which naturally may be regarded as loss of water rights.

II. Loss by Non-Use or Abuse

Non-use or abuse of a right does not ordinarily lead to loss of the right. From this general rule there are important exceptions where water rights have been granted by administrative decisions. "When any licensee abandons or ceases to use or wastes any water to which his license entitles him" and a charge is made to the Minister, he may declare the right to be forfeited.[1]

III. Loss by Failure to Utilize a Right with Due Diligence

Failure to utilize a right with due diligence does not ordinarily lead to loss of the right. There is an exception where administrative authority to construct water works has been given. Where the works have not been completed upon the expiration of the time limited for completion, the rights granted shall cease and determine except in so far as they are necessary for effectually operating the works then completed. The Minister has power to extend the time for completion, in which case the expiration of the extended time limit is decisive.[2]

IV. Loss by Breach or Non-Performance of Administrative Condition Breach of Statute, Fraud, Imposition, Error or Mistake

Where a water right has been acquired by administrative decision and there has been breach or non-performance of a condition, failure to observe the provisions of the Water Resources or Water Rights Acts or regulations thereunder, fraud, imposition, error or mistake, the Minister may declare a forfeiture of the right.[3]

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[1] Water Resources Act, R.S.A. 1955, c. 362, s. 52(1), (2).
Water Rights Act, R.S.S. 1953, c. 48, s. 51(1), (2).
Water Rights Act, R.S.M. 1954, c. 289, s. 36(1), (2).

[2] Water Resources Act, R.S.A. 1955, c. 362, s. 54.
Water Rights Act, R.S.S. 1953, c. 48, s. 52.
Water Rights Act, R.S.M. 1954, c. 289, s. 37.

[3] Water Resources Act, R.S.A. 1955, c. 362, s. 53.
Water Rights Act, R.S.S. 1953, c. 48, s. 51(3).
Water Rights Act, R.S.M. 1954, c. 289, s. 36(3).

V. Loss of Water Right Incidental to Loss of Conditional Entry Lease or Agreement

Where a water right has been granted by administrative decision and the land to be irrigated by the water granted is held under a conditional entry or a lease in accordance with the provisions of the Provincial Lands Act (Crown Lands Act), or under an agreement to purchase the land, the license for the water shall be cancelled upon receipt by the Minister of a certificate of the cancellation of the conditional entry, lease or agreement.[4]

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[4] Water Resources Act, R.S.A. 1955, c. 362, s. 51.
Water Rights Act, R.S.S. 1953, c. 48, s. 50.
Water Rights Act, R.S.M. 1954, c. 289, s. 35.

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CHAPTER 17

Certain Water Users Organizations

I. Introduction

Depending upon the physical and climatic conditions of the land, some types of water use may require large-scale undertakings in order to ensure an economic basis for their operations. This is particularly the case with regard to drainage and irrigation, sometimes also to provide a supply of water for domestic use. To handle these undertakings various organizations, partly of a private, municipal and provincial character, have grown up together with a body of law providing for their formation and administration. A short account will here be given of the main characteristics of some of these organizations.

II. Organizations Formed for Drainage Purposes

A. *Formation*

(i) ALBERTA

The first step in the formation of a drainage district is a petition to the Minister from the registered owners of at least three quarters of the land within the proposed district. The petition must specify the land owned by the petitioners, the land purported to be included in the district and the general nature of the proposed works.[1]

A preliminary examination of the proposed district is then undertaken by an engineer at the request of the Minister, the object of which is to ascertain whether the proposed drainage work is required, its nature and extent, the probable cost thereof, and what lands and roads will be beneficially affected.[2] The Minister may, upon receipt of a report from the engineer, decide to proceed with the proposed work.[3]

If the Minister decides to proceed, he must communicate the engineer's report or a synopsis thereof, either by publication or by circulating copies thereof throughout the district. The petitioners have a duty to publish a like notice.[4] The purpose of these notifications is to give the persons who may be affected by the proposed drainage district an opportunity to consider its merits and make their objections, if any. The proposed work will not be proceeded with where a substantial objection has been made.[5]

Where no substantial objection is made, an election is held where a vote is cast for or against the formation of the district.[6] Entitled to vote is every owner of land within the proposed district who is of the full age of twenty-one years.[7] Each voter has one vote only[8] (regardless of the size

[1] The Drainage Districts Act, R.S.A. 1955, c. 91, s. 5. In the case of Farquarhson v. Drainage Council, (1924) 1 W.W.R. 1122 some of the original petitioners withdrew from the petition. The remaining petitioners did not represent the required area, which was held to make expenditure upon the drainage system illegal. But the illegality was cured by curative provisions of subsequent legislation.

[2] Ss. 7 & 8.

[3] S. 9. Regarding liability for expenses where the works are not proceeded with, see Rex v. Spruce Grove M.D. (1930-31), 25 A.L.R. 111.

[4] S. 11. It is imperative that notice should be given, but irregularities in the method of giving it does not invalidate the proceedings: Farquarhson v. Drainage Council.

[5] S. 13.

[6] S. 82.

[7] S. 89.

[8] S. 96(3).

of the land owned by him and affected by the proposed works). A set of rules provides for the procedure at elections, notice of and proceedings at the polls, the ballots, declaration of voters, recount, etc.[9]

If the result of the election shows that two-thirds of the persons voting were in favor of the formation of the district, the Minister shall by order form the land described in the petition into a drainage district, provided always that no fault has taken place during the election.[10] By this order the drainage district comes into being as an organization.

(ii) SASKATCHEWAN

The procedure upon formation of a drainage district in Saskatchewan differs from the above procedure mainly on the following points. The petition must be signed by the resident owners of at least two-thirds of the land sought to be drained.[11] The engineer appointed to examine and report on the proposed work may be required to state the proportion of the cost of the work which in his opinion should be borne by each parcel.[12]

The Minister makes a report upon the utility and desirability of the work which, together with the engineer's report, is forwarded to the Lieutenant Governor in Council for his decision as to whether the work shall be undertaken.[13]

Where the Lieutenant Governor in Council decides to proceed he shall publish a notice of this intention which must contain a description of the proposed work, the estimated cost thereof and an estimate of the amount to be assessed against each parcel. The notice shall also fix a date within which any petitioner may withdraw from the petition.[14]. The notice shall in addition to publication be sent by registered mail to each owner whose land will be affected.[15]

No election is held, but each petitioner has the right to withdraw from and abandon the petition within the time stipulated in the notice. If by reason of withdrawals the area represented by the remaining petitioning owners is reduced below one-half of the total area within the proposed district, the work shall be discontinued.[16]

The final decision with regard to approval or disallowance of the proposed work lies with the Lieutenant Governor in Council. He shall, where he approves, by declaration constitute the area as a drainage district.[17]

(iii) MANITOBA

The Lieutenant Governor in Council with the approval of the Minister of Public Works, the Drainage Engineer, the Municipality or Municipalities affected and the board of the district or districts affected may create new districts. No further provisions are made for the creation of such districts or the procedure to be followed in so doing.[18]

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[9] S. 77—120.

[10] S. 15.

[11] The Drainage Act, R.S.S. 1953, c. 314, s. 3(1). See also Ss. (2) which contains slightly different requirements in connection with the petition.

[12] See also with regard to the engineer's duty, s. 3.

[13] S. 6.

[14] S. 7(3).

[15] S. 7(2).

[16] S. 8(2).

[17] S. 20. The petitioners may under certain circumstances be given the opportunity to withdraw after the above declaration has been made. See s. 21.

[18] The Land Drainage Arrangement Act, R.S.M. 1954, c. 133, s. 11.

B. *Organs Acting in Behalf of Drainage Districts and Their Administrative Control*

(i) ALBERTA

The organs through which the drainage district generally acts are the Board of Trustees and the general meeting.

The board of trustees shall consist of three voters of the district who are 21 years of age and British subjects.[19] The first board is elected by the voters in connection with the formation of the district,[20] and is constituted as such with the order of the Minister forming the district.[21] One trustee retires each year and is replaced by a trustee elected at the annual meeting.[22] The board is a body corporate.[23] It shall hold at least one regular monthly meeting. The meetings are public and the records are open to public inspection. Two members constitute a quorum, i.e., the board may make valid decisions even if only two of its members are present. Decisions are made by a majority vote.[24] The board has the power and the duty to carry out the drainage work of the district in accordance with the plans.[25] The general meeting is a meeting where each voter[26] of the district is entitled to participate. At least one general meeting must be held annually. Reports of the transactions of the district are submitted to the meeting.[27] Nominations and election of trustee must be decided by the general meeting or by separate election. The Drainage Districts Act does not provide for any other decisions being made by the general meeting. This cannot prevent the board from placing other questions before the meeting. But decisions by the meeting on other points will be advisory only and not legally binding upon the board. Another solution is incompatible with the proper functioning of the board which for a variety of dispositions needs the consent of the provincial administration. The drainage council may forbid any act or conduct proposed to be done or entered upon by the board, which in its turn presupposes that the board is free to follow administrative instructions and advice.[28]

A drainage district shall normally have the following officers: a secretary and a treasurer, an engineer and a district manager, and an auditor. They are appointed by the board.[29]

The main administrative organ for the control of drainage districts is the Drainage Council. There is one council for the province, consisting of three members appointed by the Lieutenant Governor in Council. The function of the council is to advise the various boards of trustees upon the conduct of the affairs of their districts. The council has a general power to forbid any act by a board of trustees. Assuming that a board of trustees is otherwise acting within its powers, a disposition made by the board will only be invalidated if and when it is prohibited by the council. A prohibition will probably not have retroactive effect as against a third party. But many dispositions of the board need the positive consent by the council to become valid. An important example is that "no contract for the construction of any works, entered into by a board is of any effect until it has received the assent of the council." [30]

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[19] S. 13.
[20] Ss. 77, 83, 84, 88, 111, 114, 116.
[21] S. 15.
[22] Ss. 32-36.
[23] S. 16.
[24] S. 29.
[25] S. 16. See also concerning general power of board S. 17-20.
[26] By voter means here a person qualified to vote on the formation of a district.
[27] S. 31.
[28] S. 37(1).
[29] S. 27.
[30] S. 37(7).

Both the Minister and the Lieutenant Governor in Council have wide controlling powers. Where any "appointment, act or thing" is directed by the Drainage Districts Act to be done, and it is not done or is done improperly, or ineffectually, the Minister may do the act with the same legal effect as if it had been done by the board of trustees or officer in question.[31] The Lieutenant Governor in Council may at any time appoint an official trustee to take over the powers of the elected board of trustees.[32]

(ii) SASKATCHEWAN

The work is considered a public improvement, and the management and administration of the drainage district during the construction period is undertaken directly by the province.[33]

Upon completion the municipality within which the works are situated is in charge of the administration of the drainage district for maintenance purposes. Where a drainage district extends to two or more municipalities each municipality administers as much of the district as lies within its geographic boundaries.[34]

(iii) MANITOBA

There is no provision in the Land Drainage Arrangement Act for the administration and management of the drainage maintenance district during the period of construction. This must depend upon the agreement and the order in council creating the district. The organ acting in behalf of the drainage maintenance district, upon completion of the construction, is called the Board of Maintenance Trustees. The number of trustees varies with the number of municipalities through which the district extends. One trustee is appointed by each municipality and one by the Lieutenant Governor in Council. The trustees may be replaced from time to time by the same authority which has appointed them.[35] No rules are given in the Land Drainage Arrangement Act for what constitutes a quorum or for the procedure to be followed at the meetings of the board.

The various boards of the province are controlled directly by the drainage engineer, the Minister and the Lieutenant Governor in Council. The board shall not expend money from the maintenance fund—exceeding $100 in a year—without first having obtained approval by the Minister of Public Works and the drainage engineer, who normally supervises the work.[36] And a variety of important decisions are either made by the Lieutenant Governor in Council or require his consent.[37]

C. *Payment of Drainage Expenses*

(i) ALBERTA

The financing of the construction of drainage works is provided for by the issue of debentures or by other loans.[38] Drainage rates are imposed annually to cover the expenses of the drainage district. These are of two types, the drainage service charge and the drainage debenture payment, the former being a charge to cover current expenses,[39] the latter a charge for the reimbursement of capital indebtedness whether covered by debentures or not.

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[31] S. 24.
[32] Ss. 64, 65.
[33] S. 23(1), cpr. The Highway and Transportation Act, R.S.S. 1953, c. 23, s. 5(a).
[34] Ss. 36, 37.
[35] S. 6.
[36] S. 23.
[37] See esp. s. 11.
[38] See s. 40-53 and 121-128.
[39] This includes payments into a reserve fund, payment for new expenditure and an amount sufficient to cover rebates, see s. 54.

The total annual drainage expenses are divided between the owners or occupants within the district in proportion to the benefit to the land derived from the drainage work.[40] It is the enhanced value to the land as such which must be estimated. A landowner may be in a position where he can put the land to some special use whereby he derives a benefit over and above the enhanced value to the land. This individual benefit is not to be taken into account. The benefit is estimated by the board of trustees assisted by the engineer, upon personal inspection of the ground.[41] The proper method must probably be to ascertain the exact acreage of land to be affected by the work, estimate its probable value upon completion of the work and deduct therefrom the estimated present value of the land, and to set down the balance on the assessment roll as benefit. The same set of principles for evaluation must be used throughout the district.

A parcel of land may be injuriously as well as beneficially affected by a drainage work, for instance, where part of the land is required by the drainage work. The estimated amount of damages is then deducted from the benefit and the balance will appear as net benefit (or net damages). The Drainage District Act provides for the total annual drainage rates being paid in proportion to "the benefit as the same is shown by the last revised assessment roll," which must show the net estimated benefit (or damages).[42] The full amount of damages is not permitted to be treated as a capital expense, cpr. s. 130(3).[43] The wording of these sections shows clearly that it is the net benefit which is to be used as basis. The reason for the rule may be that the financing of the districts would be too difficult if the gross benefit were to be used.

Persons outside the drainage district may be charged to the full extent of the benefit accruing.[44]

The board may reduce an assessment where the benefit actually accrued is less than estimated and cancel it where no benefit has accrued. It may also cancel drainage rates upon social considerations.[45] Consent of the drainage council is required in some cases.[46]

Since the benefit to the land can be assessed with greater certainty after it has accrued than before, provisions are made for reassessment of the land within three years after the completion of the drainage work; and the drainage council with the approval of the Minister, may in any year direct reassessment if it is found advisable due to changes in the proportionate benefits.[47, 48]

(ii) SASKATCHEWAN

Prior to the notice giving the petitioners the opportunity to withdraw,[49] the cost of the construction of the works is estimated by the Minister and assessed against the lands to be benefited[50] according to what is "just and proper."[51] Since it cannot be just and proper that, for instance, farm land which already is put to valuable use should be made to contribute to the same

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[40] S. 54(2) cpr. s. 129(1).
[41] S. 129(2).
[42] Cpr. s. 129(1).
[43] "... the board shall offset any damages resulting from the making or erecting of any works against the benefit estimated by the board as likely to accrue in respect of such land, and shall so arrive at the net benefit or damage to be entered on the assessment roll."
[44] S. 72(2), (3).
[45] S. 136.
[46] S. 136.
[47] S. 134.
[48] See concerning collection and recovery of rates, Ss. 55-60 and 168-189.
[49] See Note 15.
[50] S. 7.
[51] S. 15: This section applies when the assessment is appealed. But the principles for the evaluation in question must be the same in the first instance as on appeal.

extent as an equal acreage of marshland deriving its value as a result of the drainage work, the benefit is an element to be taken into account in this evaluation. It is questionable whether individual benefits should be evaluated where they are higher than the benefits to the land as such. The Drainage Act contemplates benefits to the land itself.[52] It is therefore probably right to disregard such individual benefits. The other important element is the proportionate cost of the work to the various parcels of land affected. Two parcels of land may, for instance, derive the same benefit from the drainage work, the cost of construction being high in the one case and low in the other. The benefit viewpoint and the cost viewpoint will not always coincide. The estimated cost of construction assessed against the lands to be affected affords the measure for the distribution of the actual drainage expenses.[53] The Drainage Act has no provisions for reassessment of this estimate. For persons outside the drainage district benefiting by the construction of the drainage works, see ss. 56, 57.

The construction of the works may be financed by issue of debentures [54] and the annual assessment is deemed to be a tax when entered in the assessment roll against the land.[55]

(iii) MANITOBA

The Land Drainage Arrangement Act contains no provisions for the financing of the construction of the drainage works. The financing and the liability for its payment will depend upon the order in council creating the district,[56] and may vary from district to district, the reason being that contributions from public funds may be required in certain cases. Where the construction expenses are not borne entirely by the province, s. 13 of the Act presupposes a distribution in the first instance between the municipalities affected. The municipalities may provide the share of the financing required of them by issuing debentures. The annual amounts necessary to meet these debentures are levied against the land according to the rules that apply for maintenance expenses.[57]

The current maintenance expenses are provided for by one maintenance fund for the drainage maintenance district. The board of maintenance trustees decides the annual contributions to be made to this fund by each municipality, and with the consent of the Minister of Public Works also the amount of the contribution by the province.[58] Each municipality charges its contribution against the land liable. The basis for the apportionment of the charge is either the assessed value of the land or the extent of the benefits to each parcel or tract of land.[59] The assessed value of the land is intended to provide an expedient basis where the benefits to the land throughout the municipality is largely the same or where the charges against the land are trifling as compared with the public contributions. It can only be used as a basis where it will lead to substantially just results as between the individual landowners. In other cases the benefit to the land must be used.

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[52] S. 7 imposes a duty upon the Minister to publish a notice of his intention to assess and levy the cost of the drainage work against "the lands to be benefited."

[53] S. 51(2) cpr. s. 17; and s. 38(1) "All drainage works shall be maintained at the expense of the lands assessed for the construction thereof, and in the proportions in which the lands are at the time assessed for the cost of construction.

[54] S. 43-50.

[55] S. 52(2) and 54.

[56] See Note 20.

[57] S. 14(1).

[58] S. 8(b), (c).

[59] S. 14(3).

III. Organizations Formed for Irrigation Purposes

A variety of different types of organizations are in existence for irrigation purposes, especially in Alberta.[60] Some irrigation projects are operated directly by the province, as is the case with the St. Mary and Milk Rivers Development,[61] the Lethbridge Northern Irrigation District[62] and the United Irrigation District.[63] In addition to these public organizations there are "irrigation districts" and "water users districts" which will be dealt with here.

A. *Irrigation Districts*

(a) *Formation—*

(i) ALBERTA

The formation of an irrigation district originates in a petition to the Minister specifying the lands to be comprised in the district and the land owned by the petitioners. It must be accompanied by evidence of the feasibility of operating the proposed district as an irrigation district. This evidence must either be the report of a qualified engineer or include such a report. The petition must be signed by owners of at least three-quarters of the land within the proposed district.[64]

Both the Minister and the petitioners have a duty to publish a notice stating that an application has been made for the formation of an irrigation district.[65]

Where no substantial objection is made to the formation of the district an election is normally held.[66] But the Minister may decide to discontinue the formation of the district at any time prior to the appointment of the returning officer, appointed for the purposes of this election.[67] Entitled to vote is every purchaser of land within the proposed district who is of the full age of twenty-one years.[68] Each voter has one vote only.[69]

If the result of the election shows that two-thirds of the persons voting were in favor of the formation of the district, the Minister shall by order form the land described in the petition into an irrigation district.[70]

(ii) SASKATCHEWAN

The rules for the formation of an irrigation district are similar to those in force in Alberta. The main differences are as follows:

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[60] Manitoba has no general rules for irrigation organizations applicable within the geographic limits of the Saskatchewan river basin. But irrigation works may be undertaken by municipalities under the Land Rehabilitation Act, R.S.M. 1954, c. 134.

[61] S.A., 1950, c. 68, s. 11.

[62] R.S.A., 1942, c. 102, see esp. s. 3 authorizing the Lieutenant Governor in Council to appoint and withdraw the appointment of a manager of the district, as well as to prescribe his powers and duties; and s. 7 whereby the manager is to hold the property vested in him in this capacity in trust for Her Majesty in the right of the Province.

[63] R.S.A., 1942, c. 104, ss. 3 & 5.

[64] The Irrigation Districts Act, R.S.A. 1955, c. 162, ss. 5, 6, cpr. form A. "Owner" is defined by s. 2(1).

[65] S. 8.

[66] S. 9(1), (2), cpr. ss. 74-116.

[67] S. 11.

[68] S. 86.

[69] S. 93(3).

[70] S. 12. In the case of Western Canada Hardward Co. Ltd., v. Farrelly Brothers Ltd. (1922) 3 W.W.R. 1017, the court of appeal of Alberta held an irrigation district to be a municipal public corporation established to effect a definite public purpose the works of which could not be seized and sold under a writ of execution, and that the works therefore were not subject to a claim of mechanics' lien.

The petition shall be signed by a majority of the owners of land in the proposed district owning at least one-half the area of the lands therein.[71]

Entitled to vote at the election concerning the formation of the district is every owner of land situated within the proposed district who is of the full age of twenty-one years, his executor, administrator or guardian. Vote may also be given by an agent acting on behalf of the owner under a general power of attorney or under a power of attorney empowering him to deal with land.[72]

If the result of the election shows that two-thirds of the persons voting are in favor of the formation of the district, the Minister shall forward a report and recommendation to the Lieutenant Governor in Council, who approves or disallows the formation of the district. In the event of approval he shall constitute and declare the area described to be an irrigation district.[73]

B. *Organs Acting in Behalf of the Irrigation Districts and Their Administrative Control*

(i) ALBERTA

The organs through which the irrigation district generally acts are the board of trustees and the annual meeting.

The board shall consist of three trustees. To be eligible as trustee a person must be a water user of the district of the full age of twenty-one years, a Canadian citizen, able to read and write in the English language, a resident of their irrigation district, and he must appear on the last revised assessment roll as an owner or purchaser of land liable for charges (provided that such assessment roll has been prepared).[74] A person is disqualified as a trustee under certain circumstances where it would be questionable whether he would act as an impartial and honest trustee.[75] Should these circumstances occur after a person has been elected a trustee, the result is that his position as trustee is forfeited. The first board is elected by the voters in connection with the formation of the district[76] and is constituted as such by the order of the Minister forming the district.[77] The board is a body corporate. It shall hold at least one regular monthly meeting. The meetings are public and the records are open to public inspection. Two members constitute a quorum. Decisions are made by a majority vote. The board has the power to carry out the irrigation work in accordance with the plans and to do the maintenance work which is necessary for the use of the district.[78]

The annual meeting is a meeting where each voter of the district is entitled to participate.[79] The trustees and the secretary shall submit their reports to the meeting.[80] Decisions made by the meeting are advisory only and not

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[71] The Irrigation Districts Act, R.S.S. 1953, c. 316, s. 5. It may also be noted that the definition of "owner" is different, s. 2.6. See concerning evidence accompanying the petition s. 7, publication of notice s. 8, and elections s. 12-52 and 60-65.

[72] S. 22.

[73] S. 53 & 54.

[74] Ss. 9(3), 24.

[75] Ss. 24, 25: dealing with persons being in arrears for more than one year with their water rates, persons holding certain contracts with the board and persons convicted of a criminal offence punishable by imprisonment for more than two years.

[76] Ss. 9, 74-116.

[77] S. 12.

[78] Ss. 31, 13.

[79] The qualifications a person must meet to be a voter are the same as those required in the formation of a district. There is this additional requirement that he must also appear upon the assessment roll where such a roll has been prepared, as having land to be irrigated. A lessee under a least option agreement with the district or colonization manager is then also entitled to vote at the annual meeting, cpr. s. 86(4), (5).

[80] S. 34.

legally binding upon the board for the same reasons as are mentioned for annual meetings of drainage districts.[81] Election of trustee is ordinarily held immediately after the close of the annual meeting.[82]

An irrigation district shall normally have the following officers: a secretary and a treasurer, an engineer and a district manager, and an auditor.[83]

The main administrative organ for the control of irrigation districts is the irrigation council. There is one council for the province consisting of three members or less appointed by the Lieutenant Governor in Council. The function of the council is to advise the various boards of trustees upon the conduct of the affairs of their districts. The council has a general power to forbid any act by a board of trustees,[84] and many dispositions by the board need the consent of the council to become valid.[85]

Both the Minister and the Lieutenant Governor in Council have wide controlling powers similar to the powers over a drainage district.[86]

(ii) SASKATCHEWAN

The organ through which the irrigation district generally acts is the board of trustees. The board shall consist of three, five or seven trustees, as directed by the Minister. Eligible as trustee is every owner resident in the proposed district.[87] The Irrigation Districts Act does not stipulate any disqualifying circumstances. The first board is elected by the voters in connection with the formation of the district,[88] and is constituted as such by the declaration of the Lieutenant Governor in Council forming the district.[89] The board is a body corporate. The meetings are public and the records are open to public inspection. A quorum is made up of three members, where the number of trustes is seven or five, and two where the number of trustees is three. Decisions are made by a majority vote. The board has the power to construct the irrigation works in accordance with the plans and to maintain them.[90] The trustees hold office for one year only, unless re-elected.[91] The Act has no provision for annual meeting of the owners.

An irrigation district shall normally have the following officers: a secretary and treasurer, a manager, an engineer, and an auditor.[92]

The administrative control of drainage districts is divided between the local government board, the Minister and the Lieutenant Governor in Council. The local government board has primarily an advisory function, but its assent is necessary for certain important decisions, for instance, contracts for the construction of any work and borrowing of money upon the credit of the district.[93] The Minister may appoint the necessary officers where the board fails to make the appointment or where the appointed officer fails to perform the prescribed duties.[94] The Lieutenant Governor in Council may at any time appoint an administrator to take over all the powers previously possessed by the board.[95]

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[81] See Notes 26-28.
[82] Ss. 40, 41.
[83] S. 29.
[84] S. 43.
[85] S. 43(8).
[86] See for instance, ss. 23.70.
[87] S. 11(3) and (4).
[88] Ss. 12, 17 & 20.
[89] S. 54.
[90] S. 70, 73(3) and (4), 183.
[91] The proceedings at the annual election are with some minor exceptions the same as those provided for the first election, cpr. s. 58.
[92] Ss. 71(3), 72, 105 and 187.
[93] Ss. 76(6) and 144.
[94] S. 186.
[95] S. 191.

C. *Payment of Irrigation Expenses*

(i) ALBERTA

The construction of the whole or a part of the irrigation work may be apportioned between the individual water users, in which case they must themselves finance the construction of their respective portions.[96]

The work may also be constructed by the district as one undertaking. The financing is then provided for by the issue of debentures or by other loans.[97]

Irrigation rates are imposed annually to cover the expenses of the district. They consist of the water service charge and the water right payment, the former being a charge to cover current expenses, the latter a charge for the reimbursement of capital indebtedness whether covered by debentures or not.

Where the construction of the whole or a part of the irrigation work is undertaken by the individual water users, the apportionment shall be in proportion to the number of acres of their respective lands to be irrigated, s. 58(2).

Imposed rates may be cancelled or reduced if the payment would work an injustice or hardship on the water user, for instance, where he has had a total or partial crop failure.[98] There is no obligatory reassessment of the whole district after it has come into operation, but the board may by by-law provide for the making of a new assessment roll and individual errors may in certain circumstances be corrected.[99]

(ii) SASKATCHEWAN

The financing of the construction of the irrigation work is provided for by the issue of debentures or by other loans.[100] An assessment roll is prepared in which is set down the number of acres to be irrigated for each owner.[101] The irrigation rate is imposed annually and is made up of the total annual amount required to reimburse the debentures and other loans plus the amount necessary to cover current expenses which is divided equally between each acre of land to be irrigated.[102] The irrigation rate is treated as a municipal tax.[103] A new assessment roll may be provided for in the same way as in Alberta,[104] and individual errors in the roll may be corrected where they are "gross and palpable."

(d) It may be noted that partly different rules apply to two irrigation districts in Alberta, the Eastern Irrigation District and the Western Irrigation District, see R.S.A., 1942, c. 101 and S.A., 1944, c. 16, respectively. An important point for the characterization of these districts is that their daily affairs are to be conducted by a general manager appointed by the board upon previous approval by the irrigation council. Disputes between the board and the general manager as to the conduct and management of the affairs and business of the district are decided by the irrigation council with a conclusively binding effect both upon the board and the manager. This places the two districts closer to the districts operated directly by the province than to those described above as far as public control is concerned.

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[96] S. 58.
[97] Ss. 46-57, 117-122.
[98] S. 141.
[99] Ss. 138-140.
[100] S. 142-174.
[101] S. 106.
[102] S. 175.
[103] S. 181.
[104] S. 125(2).

IV. Organizations Formed for Miscellaneous Purposes

A. *Water Users' Districts*

Rules governing water users districts are to be found in Alberta and Saskatchewan, but not in Manitoba (within the geographic limits of the Saskatchewan River Basin). As they perform a different function in the two provinces each province will be dealt with separately.

(i) ALBERTA

Water users districts are associations which may be formed for irrigation purposes. The need for such associations is primarily present where the main irrigation work only is undertaken by the irrigation district, or the private or public operator, and the system for the distribution of water is undertaken by the water users. One or more associations may be formed within the limits of an irrigation system.

(a) *Formation.*—The formation originates in a petition by owners of at least half of any tract of land within an irrigation district or which is served or proposed to be served by an irrigation system to the owner of the system requesting that the formation of a water users' association be consented to.[105] The petition may be assented to where the owner is satisfied as to the propriety of converting the tract into a district. The district comes into being upon the completion of the subsequent election of its governing organ.[106]

(b) *The organ acting in behalf of the water users' district.*—The district is governed by a board of managers consisting of three persons who are elected.[107] Entitled to vote at the election is every owner of land within the district of the full age of twenty-one years,[108] and every person entitled to vote is eligible as manager provided he is resident within the district.[109] The board is a body corporate.[110] Election is held annually to fill the vacancies which occur. Decisions by the board are made by a majority vote. S. 19 provides for the managers making their decisions at meetings. Since one manager alone cannot be said to be a "meeting," at least two managers are necessary to make up a quorum. This is, on the other hand, enough, as s. 19(3) assumes that an equality of votes may occur which can only happen where two managers are present. Within their district and subject to the approval of the person supplying water to the district, the board of managers is authorized to provide for the equitable distribution of water and the maintenance of the irrigation ditches committed to their charge.[111]

(c) *Payment of irrigation expenses.*—The annual expenses consist of payment of the water received from the owner of the main irrigation system and the payments necessary for the conduct of the business of the association. These expenses are imposed upon the owners of the land within the district at an equal rate per acre of the area to be irrigated by the ditches committed to the charge of the association. The rate is regarded as a municipal tax.

The maintenance of the ditches may be allotted to each of the persons constituting the water users' association. The Water Users' District Act does not stipulate in what proportion the maintenance is to be allotted. But since

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[105] The Water Users' Districts Act, R.S.A. 1955, c. 363, ss. 3, 4.
[106] S. 5.
[107] Ss. 5-10.
[108] S. 6, cpr. s. 2(b) defining "owner".
[109] S. 9(2).
[110] S. 5(2).
[111] S. 12.

the maintenance expenses are apportioned upon the basis of the number of acres to be irrigated, where the work is undertaken by the board of managers, it would seem to follow that the same basis must be used where the maintenance work is undertaken by the individual water user. At the time of the allotment the estimated annual maintenance cost of the portion of the ditches allotted to each water user would have to bear the same proportion to the estimated total annual maintenance cost as his number of acres to be irrigated bears to the total number of acres to be irrigated.[112]

(ii) SASKATCHEWAN

(a) *Formation.*—A water users' district in Saskatchewan may be formed for the purposes of irrigation, drainage, flood control or domestic use.

Three or more resident ratepayers of a proposed district may present a petition to the Minister for the establishment of a water users' district. The petition shall contain a full description of the proposed district, the Water Users' Act, R.S.S. 1953, c. 317, s. 4(1) & (2). The Act assumes without directly stating it that the petitioners must represent all the land proposed to be included in the district, cpr., the wording of s. 7 and s. 6, which stipulate that an already existing district can be extended to include land outside the district only with the consent of the resident ratepayers whose land it is proposed to add to the district. The Minister decides upon such inquiries as he deems expedient whether or not to form a water users' district in accordance with the petition, s. 5. A decision to form the district is made by order to be published. The members of the district become a body corporate upon proper publication of the order, s. 7. But works constructed by an association is appurtenant to the lands of its members in proportion to their respective interests in the association, and every member is personally liable for each debt and obligation of the association in the same proportion, ss. 8 & 21.

(b) *Organs acting in behalf of a water users' district and its administrative control.*—The organs acting in behalf of the water users' district are the board of directors and the general meeting.

The board of directors shall consist of three or more persons as the association may determine. The first board consists of the petitioners. The Minister may appoint one member to represent him on the board. The association stipulates the procedure to be followed at the meetings as well as the rules for re-election of the elected directors, s. 16, cpr. s. 11(a) & (b).

The general meeting is a meeting where all the members of the district are entitled to participate. The meeting has the power to decide any question affecting the association or its affairs, but some decisions must be made by by-law in which case they need the Minister's approval to become binding, s. 18(1), cpr. s. 11 & 12. At least one meeting must be held each year. Special meetings of the members may be called at any time by the board, and must be called by the board if required by three members. The special meeting deals only with the specific business set out in the notice for its calling. Each member has one vote which counts in proportion to his interests in the association and all questions are determined by the majority in interest of the members voting, s. 18.

The Minister may exercise a certain amount of public control where he chooses to appoint a member to represent him on the board of directors, s. 16(3), and all by-laws need his approval, s. 12.

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[112] S. 12-15. The basis for the allotment of the maintenance work can no doubt be changed by agreement, and it will probably amount to an agreement where a different allotment has been provided for and acted upon.

The Lieutenant Governor in Council may at any time appoint an administrator "who shall have all the powers and may perform any of the duties conferred or imposed ... upon the board or its employees," s. 17(1). S. 17(2) further provides that the board and its employees shall cease to function upon the appointment of an administrator, but the Act has no similar provision for the general or special meeting. This gives rise to the question whether the administrator who replaces the board of directors is subordinate to the meeting, in the same way as the board itself is when it functions. If this question were answered in the affirmative the result might be to cancel entirely the intended effect of the administration since the meeting may decide any matter affecting the association or its affairs and a meeting must be called whenever required by three members (s. 18(1) & (3)). S. 17(4) provides for the appointment by the association of an advisory committee where an administrator has been appointed. This provision would be unnecessary if the administrator were subordinate to the meeting. It must therefore follow by way of necessary implication that the meeting also ceases to function upon the appointment of an administrator, unless the order in council making the appointment contains contrary provisions.

(c) *Payment of expenses.*—The construction of the works of a water users' district is financed either directly by the members or by loans, s. 25, 11(g) & 14. The maintenance of the works may be undertaken by the district or provided for by imposing upon each member the duty to maintain a certain portion of the works, s. 11(d).

The annual expenses of the association are the amount required to repay loans and interest thereon, operation expenses, and maintenance expenses where the maintenance work is undertaken by the association. An assessment roll is prepared showing the estimated amounts required and the portions thereof which are payable by the members in proportion to their respective interests in the association, s. 26.

The general rule is that the interest of each member is based on the proportion that the maximum quantity of water to which he is entitled bears to the aggregate maximum quantities of water to which all the members are entitled.

Where a water users' district is formed for the purpose of irrigation, the general meeting may decide that the interests are to be measured by the respective areas of the lands of the members which are irrigated by means of the works operated by the association, s. 19. This decision is subject to the approval of the Minister.

Where the financing of the construction of the works is undertaken directly by the members, it would follow by way of analogy that the costs must be borne by them in proportion to their respective interests thus estimated, unless a different agreement is made.

Where the maintenance of the works is undertaken directly by the members, such portion may be allotted to each member as the association "deems expedient." This presupposes that the allotment does not have to be in proportion to the interests, but it must be substantially just. The allotment must be made in the form of a by-law and needs the consent of the Minister.

B. *Conservation and Development Areas*

In Saskatchewan conservation and development areas may be formed for the purpose of saving, conserving or developing any land or water resource under the Conservation and Development Act, R.S.S. 1953, c. 203. The wording

of the purpose clause is wide enough to include the purposes for which other organizations previously mentioned may be established in Saskatchewan, but the statutes forming the legal basis of the particular organizations are not repealed. It is therefore possible to proceed either under the particular Acts or under the Conservation and Development Act where they overlap.

(a) *Formation.*—A conservation and development area may originate in a petition to the Minister of Agriculture signed by at least fifty-one per cent of the owners of land within the proposed area and must define the proposed area by setting out each parcel of land to be included, s. 5. The Minister may also form an area on his own initiative, without petition. In either case it is by order of the Minister that the conservation and development area is established. The Minister may in his discretion make the order where in his opinion land is being benefited or can be benefited by means of works necessary to save, conserve or develop any land or any water resource, s. 3.

(b) *Organs acting in behalf of a Conservation and Development area and its administrative control.*—The main governing body of an area is called the area authority. The Minister decides whether an area is of sufficient size to require an area authority, s. 4. The Act does not state by whom the area is to be governed where it is found too small to require an area authority.

The number of members making up the area authority varies from three to nine, depending upon the number of townships comprised in the area, and is elected among owners or occupants of land within the area of the full age of eighteen years, by themselves or their legal representatives, ss. 11, 12. An elector has one vote only irrespective of the extent of land ownership. The first election is held at the expiration of thirty days from the publication of a notice, done after the order establishing the area, ss. 13-15, cpr. s. 4.

From these rules there is an exception where an area is established without a petition and includes all the land in a rural municipality and no other land. The Minister shall then appoint the council of the municipality as the area authority, in which capacity the council will function until a new area authority has been elected. The council decides whether or not to elect a new area authority, s. 11a.

An area authority which has been elected holds office for three years when new elections are held. The area authority is a body corporate, s. 16. It holds two regular meetings each year and as many special meetings as necessary. The number of members required to make up a quorum is not provided for by the Act. Decisions are made by a majority vote, s. 21.

The area authority has power to carry out such works as may be authorized by an engineer appointed to a position in the public service of Saskatchewan or employed by any agency of the government of Canada assisting in the conservation and development of the soil and water resources of Saskatchewan, ss. 18(1), 2(6). But if the decision to construct works has been made by the area authority, consent of the Minister is required, s. 9(2). The area authority has power to acquire mechanical power for the purpose of maintaining and repairing works in the area on terms approved by the Minister, and has a duty to perform works within the area required by the Minister, s. 18(2), (3).

The area authority shall elect a chairman among its members, and appoint a secretary-treasurer and an auditor.

From what has been said it will appear that the area authority is subject to administrative control by the Minister and the "engineer". Further administrative control is exercised by the local government board. Where the area authority intends to raise money by loan on debenture for construction or maintenance of works it must prepare a plan and estimate of costs to be

transmitted to the local government board which decides whether or not the loan will be authorized, ss. 28-30. The Lieutenant Governor has wide powers to make regulations and orders, and may at any time appoint an official trustee to conduct the affairs of an area, ss. 81, 83. The books and records of the area authority are subject to examination and audit by the provincial auditor, s. 23. The land utilization board makes recommendations with respect to inclusion or exclusion of any land in or from an area under sections 6 and 7, and may acquire certain executive functions by delegation from the Minister, s. 80.

(c) *Payment of Conservation and Development expenses.*—Funds to meet the costs of construction or maintenance of works may be raised by issue of debentures or other loans, ss. 27-44. An assessment roll is prepared in which is set down the number of acres to be benefited for each owner. An assessment is made annually and is composed of the total amount required to repay the loan and the amount necessary to cover current expenses. This is divided equally between each parcel of land to be benefited. Where this basis of assessment would be inequitable the Lieutenant Governor in Council may prescribe a different basis having regard to the varying degrees to which the respective parcels of land are or will be benefited, ss. 26, 45. The assessment roll may in some circumstances be amended and an individual assessment may be cancelled or reduced if payment would work an injustice or hardship on the owner, ss. 57-60.

CHAPTER 18

The Interprovincial Relationship

1. The Theory of the One and Indivisible Crown

The legal relationship between the provinces presents considerable difficulty. The theory of the Crown as one and indivisible has been said to preclude the existence of proprietory rights as between the provinces. The reasoning is that where, for instance, the province of Alberta is attempting to assert a proprietory right against the province of Saskatchewan the person in whom the rights are vested is in each case the Queen, and she cannot have any rights against herself.

The earliest reported case where the question of a person's right to sue himself appears to have arisen is Moffat v. Van Millingen (1787), 2 Box & P. 125 n; 2 Chit 539; 126 E.R. 1193, n. The plaintiff had jointly with two other persons made a promise to himself which he sought to enforce against one of the two other promissors. This was refused upon the following reasoning: "How can he sue himself in a court of law? It is impossible to say that a man can sue himself." Another case where the same point came up is Simpson v. Thomson (1877), 3 App. Cas. 279, where two ships belonging to the same shipowner had collided due to negligent navigation of one of the ships. The shipowner collected the insurance money from the insurer and deposited money in court under a statute limiting his liability. The insurer asserted a right to rank against the fund for his loss caused by the negligent navigation. The House of Lords held that the insurer upon payment of the insurance money became entitled to exercise the same rights as the insured himself could have exercised with regard to the insured property. The liability for negligent navigation attaches to a shipowner as a result of his liability for negligent acts of his servants. And since both ships were owned by the insured the claim, if asserted by him, would have been a claim against himself. Such a right of action was refused by the House of Lords, Lord Penzance characterizing it as an absurdity and a thing unknown to the law. If the absurdity, the abuse of the process of the court in invoking its assistance for the solution of a claim a man attempts to assert against himself, is the ratio for refusing access to the court, it is probable that the denial of a right of action will be limited to cases where a real absurdity can be said to exist.

In the case of Miles v. Durnford (1852), 42 E.R. 1022 C.A., one of two executors had mortgaged certain property. After his death the surviving executor took out letters of administration regarding the deceased executor's estate. He then filed a bill to set aside the mortgage as having been illegally made. The court held that the plaintiff quoad executor was seeking to assert a claim against himself quoad administrator, and that he could not legally enforce a right against himself. But the decision was reversed by the court of appeal, holding that he had a right of action. There is also American authority for the proposition that "the rule (refusing a right of action) has no application where according to the actual interests involved the case does not amount to an action by one party against himself." [1]

[1] Corpus Juris Secundum I 1074 and cases there cited.

Turning from the general rules governing the right to entertain an action to their constitutional application attention must first be drawn to the dual capacities of the Queen, Her private and Her representative capacities. When the Queen acts constitutionally it is today always in a representative capacity as a "legal person." A legal person is a creation of the law made mainly for the purpose of facilitating the enforcement of rights and duties by means of representatives to whom the rights and duties are said to attach in the first instance. The Queen may through the proper legislative assembly create as many subdivisions of the Crown as is thought desirable and bestow upon them legal personality. In the internal constitutional sphere a right of action has to a limited extent been conferred upon the Dominion as against the provinces and vice versa with regard to reference cases. In such cases the Crown is both plaintiff and defendant, although the cases are instituted in the names of the respective attorneys-general. In the international field the Crown as representing Canada is for most purposes a different legal person than the Crown as representing England. It will be seen that the question of the Queen's right of action against Herself in Her various representative capacities stands on a different footing than the question of a physical person's right of action against himself, and cannot ipso facto be characterized as an absurdity. Whether or not this amounts to an abuse of the process of the court must depend upon the situation in which the question arises.

The B.N.A. Act of 1867 recognizes a distribution of proprietory rights between the original provinces and the Dominion which has been given legal effect to by the courts.[2] In the case of St. Catharines Milling Co. v. The Queen, 14 App. Cas 46, 56, Lord Watson said: "The enactments of section 109 (of the B.N.A. Act) are, in the opinion of their lordships, sufficient to give to each province subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the union were vested in the Crown..." Alberta, Saskatchewan and Manitoba must after the transfer of the natural resources be in the same legal position with regard to Crown lands within their respective boundaries as the four original provinces. It follows that the actual interests involved in a case concerning the proprietory rights of two provinces would not amount to an action by one party against himself, even though each party nominally would institute the action in the name of the Queen.

The theory of the one and indivisible Crown as a bar to a claim between a province and the Dominion was refuted by the Privy Council in the case of in re Silver Brothers, (1932) A.C. 514. A Special War Revenue Act (Canada) provided that liability to the Crown for taxes under the Act should rank in priority to all other claims against a debtor. The R.S.Q. Art. 1357 provided that "All sums due to the Crown in virtue of this section shall constitute a privileged debt, ranking immediately after law costs." The Interpretation Act (Canada) stipulated that "no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, unless it is expressly stated therein that His Majesty shall be bound thereby." The provincial argument was that the Special War Revenue Act, if it purported to give priority to the claim by the Crown in the right of the Dominion ahead of the claim by the Crown in the right of the province, was an enactment whereby His Majesty was bound to the detriment of one of his provincial rights, which had not been expressly stated. The Dominion argument was that the Special War Revenue Act conferred a benefit upon the Crown, and since the Crown is one and indivisible it could not be prejudicially affected at the same time. The Privy Council remarked (at p. 524): "Quoad the Crown in the Dominion

2 See for instance, A.-G. of Canada v. A.-G. of Ontario (1898) A.C. 700, 709.

of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different."

The same statutory distinction exists between the provinces with regard to Crown revenues and property within their respective boundaries. It is therefore probable, as well upon principle as upon authority, that the theory of the one and indivisible Crown will be held not to prevent legal solutions of interprovincial disputes should the question come to be decided by the courts.

II. Territorial Jurisdiction to Entertain Interprovincial Disputes

(i) The Exchequer Court Act, R.S.C. 1952, c. 98, s. 31(1) provides: "Where the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court has jurisdiction in cases of controversies, (b) between such province and any other province or provinces that have passed a like Act, the Exchequer Court has jurisdiction to determine such controversies." The jurisdiction of the Exchequer Court cannot be invoked unless such reciprocal enactments have been passed by the provinces between whom the dispute has arisen. No such general reciprocal enactments are in force in Alberta, Saskatchewan and Manitoba. But reciprocal enactments may presumably be made in connection with specific controversies.

(ii) The Exchequer Court Act, R.S.C. 1952, c. 98, s. 17 gives exclusive jurisdiction to the Exchequer Court of Canada in practically all actions against the Crown in the right of Canada. But this does not apply to actions against the Crown in the right of a province which, under certain circumstances, may be sued in the courts of that province. If it is found that the theory of the Crown as one and indivisible does not constitute a bar to an action between two provinces this procedure may also be open where the plaintiff is another province, provided the general conditions for invoking the jurisdiction of the provincial courts against the Crown are satisfied.

At common law an action would lie against the Crown in the name of the Attorney-general without consent where a declaration of right was sought: Dyson v. Attorney-General, (1911) 1 K.B. 410.

In other cases proceeding might to a limited extent be instituted by petition of right, which necessitated consent by the Crown. These proceedings are now regulated by statutes in all the three provinces to which reference is made: Alberta Petition of Right Act, R.S.A. 1955, c. 231, Proceeding against the Crown Act, R.S.S. 1953, c. 79, Proceedings against the Crown Act, R.S.M. 1954, c. 207.

The general rules of territorial jurisdiction may form an obstacle to the jurisdiction of provincial courts being invoked in interprovincial disputes over water rights. It is settled law that the courts will not entertain jurisdiction concerning title to foreign lands or try an action founded on a disputed claim of title to such lands: British South Africe Co. v. Compania de Mozambique (1893) A.C. 602. The underlyings substantial grounds appear to be that title to land can best be adjudicated upon in the country where the land is situate, and a judgment as to title would be unenforceable in a foreign country and therefore meaningless. In an action for damages to land or for infringement of proprietory rights to land, the same viewpoint applies to the convenience of the forum. The judgment would be enforceable, but when enforced the

plaintiff might, in cases of dispossession, repossess himself of the lands and thus obtain relief twice. The courts have therefore declined to exercise jurisdiction over defendants brought before them in such cases as it would amount to an abuse of process of court.

By foreign lands is meant lands situate in a territory where a different and distinct legislative body has supreme control over the lands in question. Since each province has supreme legislative control over the lands within its boundaries lands situate in another province is "foreign lands" in this respect and the rules of territorial jurisdiction have been applied without modification, which the federal organization of Canada would seem to require. Thus in the case of Albert v. Fraser Companies (1937) 1 D.L.R. 39 the majority of the court of appeal of New Brunswick refused to entertain jurisdiction in a case where obstruction to the natural flow of water in New Brunswick caused flooding of land situate in Quebec holding that the jurisdiction of the provincial courts is excluded where a controversy relates to land in a foreign country. A dispute of this nature will relate to lands in two provinces and the courts of neither province will have jurisdiction to entertain the dispute according to the majority judgment. A denial of justice results.

If prevention of abuse of process of court is the ratio of the Mozambique case that ratio is inapplicable to the above mentioned situation. Title or right to possession of land is not in issue. The convenience—or inconvenience—of the forum will be the same if the course of either province entertains jurisdiction. There cannot be any duplication of remedies, and judgments awarding damages are enforceable under the Reciprocal Enforcement of Judgments Acts.[3]

III. The Substantive Law Applicable to Disputes Between Provinces

The crucial question is whether a province may legally harness an interprovincial watercourse to the detriment of another province, f.i. by completely exhausting the flow of water; or, if no absolute right exists, what the limitations are.

A legal dispute between two provinces must be decided according to principles of law.[4] Several courses are open and in the absence of decisions the course which will be chosen remains a matter of conjecture. The law which may be applied is either municipal law or international law. The municipal law is either the principles of riparian rights or the principles for allocation and use of water as expressed by the Water Resources and Water Rights Acts of Alberta, Saskatchewan and Manitoba. This legislation has, with certain reservations, replaced the law of riparian rights as far as utilization of water is concerned. Its leading principles underlying as well allocation as loss of water rights is the principle of most beneficial use. It is not open to any one province to legislate with regard to the legal rights and duties of another province, but the courts must be entitled in an interprovincial dispute to subject the provinces to the legal principles enacted by them as just and equitable between their own inhabitants, when these principles are substantially the same in the contesting provinces, and when the provinces have accepted benefits under the enactments.

In international law a distinction is possible between the law governing independent states and the law regulating the relations between member

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[3] R.S.A. 1955, c. 280.
R.S.S. 1953, c. 84.
R.S.M. 1954, c. 221.
See also Brereton v. C.P.R. (1897-98), 29 O.R. 57 and Malo and Bertrand v. Clement (1943) 4 D.L.R. 773, and the dissenting votum of Harrison, J. in the Fraser case.

[4] Province of Ontario v. Dominion of Canada, (1910) 42 S.C.R. 1 at p. 118.

communities of confederations. Reference is made to the report of the Royal Commission on the South Saskatchewan river project p. 170-172 where a number of decisions by the courts of the United States in interstate disputes is collected and commented on.[5]

IV. Interprovincial Agreements

The Prairie Farm Rehabilitation Act, S.C. 1935, c. 23 (now R.S.C. 1952, c. 214) was passed i.a. for the purpose of promoting within the provinces of Manitoba, Saskatchewan and Alberta systems of water supply which would afford greater economic security. By order in council of June 19, 1947 (P.C. 2297) the Dominion Minister of Agriculture was authorized to execute an agreement for the establishment of the Prairie Provinces Water Board and by agreement of July 28, 1948 between Manitoba, Saskatchewan and Alberta and Canada, the Board was established. It is composed of five members, two appointed by Canada and one by each of the three provinces. The Board has power, upon the request of any one of the three provinces or the Dominion, to recommend the allocation of the waters of any interprovincial stream among the respective provinces. A recommendation becomes effective when adopted by orders in council passed by Canada and by each of the provinces affected thereby. Thus, a sufficient procedure for arriving at interprovincial agreements is in existence and a number of such agreements have been reached.

If agreements and legal actions are considered as opposite means of solving interprovincial disputes, the probability is that these disputes may receive wiser solutions when made in co-operation with all parties concerned than by legal decisions. A wider range of considerations can be drawn upon in the former case than in the latter. But it is perhaps here, as elsewhere, the better view to consider agreements and legal proceedings as supplementary to each other. The existence of the possibility to solve disputes by legal proceedings prevents deadlocks, and knowledge of its existence may be conducive to the spirit of negotiation and mutual concession. An agreement once made may create further disputes as to its meaning, should unforeseen situations arise, which in turn may lead to deadlocks unless arbitration is provided for by the agreement. In other fields of human activity only a fraction of the actually arising disputes find their solution by the courts. It is not probable that the percentage would be much higher where the provinces are the interested parties. For these reasons, the desirability of having interprovincial disputes solved by agreements ought not to prevent the establishment of a general jurisdiction to entertain them.

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[5] See also Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, Geneva 1952 (United Nations) E/ECE/136. E/ECE/EP/98 Rev. 1, p. 71-79.

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